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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

MAY and SEPTEMBER TERMS, 1915

BY
U. G. WHITNEY
REPORTER

VOLUME 171

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1916

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By
STATE OF IOWA.

JUL 18 1916

JUDGES OF THE SUPREME COURT.

HORACE E. DEEMER, *Chief Justice*, Montgomery County.

SCOTT M. LADD, O'Brien County.

SILAS M. WEAVER, Hardin County.

WILLIAM D. EVANS, Franklin County.

FRANK R. GAYNOR, Plymouth County.

BYRON W. PRESTON, Mahaska County.

BENJAMIN I. SALINGER, Carroll County.

OFFICERS OF THE COURT.

GEORGE COSSON, *Attorney General*, Audubon County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

JUDGES OF THE COURTS

during the time of these reports, from which appeals may be taken to the Supreme Court.

(NAMES ARRANGED IN ORDER OF SENIORITY OF SERVICE.)

DISTRICT COURTS.

- First District*, two judges—HENRY BANK, JR., Keokuk; WILLIAM S. HAMILTON, Ft. Madison.
- Second District*, four judges—* F. W. EICHELBERGER, Bloomfield; C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, two judges—HIRAM K. EVANS, Corydon; THOMAS L. MAXWELL, Creston.
- Fourth District*, three judges—† JOHN F. OLIVER, Onawa; † DAVID MOULD, Sioux City; GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Onawa (1915); W. G. SEARS, Sioux City (1915).
- Fifth District*, three judges—J. H. APPLGATE, Guthrie Center; WILLIAM H. FAHEY (1911), Perry; LORIN N. HAYS (1911), Knoxville.
- Sixth District*, three judges—K. E. WILLCOCKSON, Sigourney; JOHN F. TALBOTT, Brooklyn; HENRY SILWOLD, Newton.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport; † LAWRENCE J. HORAN, Muscatine.
- Eighth District*, one judge—RALPH P. HOWELL, Iowa City.
- Ninth District*, five judges—† HUGH BRENNAN, Des Moines; W. H. MCHENRY, Des Moines; LAWRENCE DE GRAFF, Des Moines; CHARLES A. DUDLEY, Des Moines; WM. S. AYERS, Des Moines; HUBERT UTTERBACK, Des Moines.
- Tenth District*, three judges—† FRANKLIN C. PLATT, Waterloo; GEORGE W. DUNHAM, Manchester; CHAS. W. MULLAN, Waterloo; H. B. BOIES, Waterloo.
- Eleventh District*, three judges—R. M. WRIGHT, Ft. Dodge; † C. G. LEE, Ames; † C. E. ALBROOK, Eldora; H. E. FRX, Boone (1915); EDWARD M. MCCALL, Nevada (1915).
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—A. N. HOBSON, West Union; WILLIAM F. SPRINGER, New Hampton.
- Fourteenth District*, two judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville.
- Fifteenth District*, five judges—A. B. THORNELL, Sidney; ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic.
- Sixteenth District*, two judges—† FRANK M. POWERS, Carroll; M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, three judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton.
- Nineteenth District*, two judges—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; W. D. BOIES, Sheldon.

SUPERIOR COURTS.

- Cedar Rapids*—CHARLES B. ROBBINS.
Council Bluffs—FRANK J. CAPELL.
Grinnell—PAUL G. NORRIS.
Keokuk—W. L. MCNAMARA.
Oelwein—JOHN R. BANE.
Perry—W. W. CARDELL.
Shenandoah—GEO. H. CASTLE.

* Died, Oct. 11, 1914.

† Retired, Dec. 31, 1914.

‡ Resigned, April 27, 1914.

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CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT

DES MOINES, JANUARY AND MAY, 1915, TERMS,

AND IN THE SIXTY-NINTH YEAR OF THE STATE.

STATE OF IOWA, Appellee, v. EARL PERKINS, Appellant.

CRIMINAL LAW: Trial—Instructions—Included Offenses—Duty to Submit Rule—Rape. An included offense must be submitted to the jury on the concurrence of two facts, to wit: (1) When such included offense is charged in the indictment, and (2) when the record contains evidence justifying the jury in finding the accused guilty of such included charge and offense rather than of some higher offense.

PRINCIPLE APPLIED: Defendant was accused of rape with force and arms and by making an assault on the prosecutrix, a female over the age of consent. The evidence showed an actual battery. Court failed to submit the offense of assault and battery. *Held*, reversible error.

Appeal from Mills District Court.—HON. A. B. THORNELL,
Judge.

WEDNESDAY, JUNE 23, 1915.

DEFENDANT was indicted for the crime of rape. Upon trial to a jury, he was convicted of an assault with intent to commit rape, and appeals.—*Reversed and Remanded.*

Genung & Genung and W. S. Lewis, for appellant.

George Cosson, Attorney General, and Wiley S. Rankin, Special Counsel, for the state.

DEEMER, C. J.—The indictment charges the crime of rape with force and arms, and the making of an assault upon the prosecutrix, Bessie Irene Miller; and the sole question raised by the appeal relates to the failure of the trial court to charge that assault and battery was an included offense, of which defendant might be convicted. The indictment was broad enough to cover this offense, and the testimony tended to show not only an assault, but an actual battery.

1. CRIMINAL
LAW: trial: in-
structions: in-
cluded of-
fenses: duty
to submit
rule: rape.

In these circumstances, the trial court should have instructed upon the included offense, and left it to the jury to say whether or not the defendant should have been convicted of this offense, rather than some higher degree of crime. *State v. Kyne*, 86 Iowa 616; *State v. Hutchinson*, 95 Iowa 566; *State v. Barkley*, 129 Iowa 484; *State v. Egbert*, 125 Iowa 443; *State v. Trusty*, 118 Iowa 498; *State v. Harrison*, 167 Iowa 334.

Neither the fact that defendant was convicted of an assault with intent, nor that the court did instruct as to simple assault, obviates the error in failing to instruct as to assault and battery. This is pointed out in the authorities already cited.

To avoid misapprehension, it is to be observed that the prosecutrix was over the age of consent, she being twenty years of age.

For the error pointed out, the judgment must be, and it is, reversed and the cause remanded.—*Reversed and Remanded.*

LADD, GAYNOR and SALINGER, JJ., concur.

AALT VAN DYK et al., Appellees, v. G. MOSTERDT, Appellant.

APPEAL AND ERROR: Errors Against Nonappellant—Effect. An
1 appellant may not ride to victory on errors, if any, suffered
by a litigant who does not appeal.

PLEADING: Amendments—Substituting Partnership Entity for In-
2 **dividual Plaintiff.** The pleadings in an action on a partnership
claim, improperly brought in the individual name of one of
the partners, may be amended during trial by substituting the
partnership entity as plaintiff. Nonsuits upon purely technical
grounds are not favorites of the law.

ANIMALS: Negligent Handling—Sufficiency of Evidence. Evidence
3 reviewed and held to present a fact question for the jury (a)
whether an animal died as the result of negligent handling, and
(b) whether defendant was responsible therefor.

PARTNERSHIP: Partners—Negligence of—When Binding on Part-
4 **nership.** Whenever a partner steps aside the scope of the partner-
ship and acts not for the partnership but solely for someone
else, *even with reference to partnership property*, his new prin-
cipal is bound thereby, not the partnership.

PRINCIPLE APPLIED: Two partners owning a stallion placed
the same in the hands of a bailee for keeping. One of the
partners was a son of and lived with and worked for the bailee.
This partner, in carrying on the business of his father (the
bailee) and solely in the interest of the bailee, negligently directed
the horse to be used in certain work and in a certain manner,
which resulted in the death of the animal. *Held*, the partner-
ship was not, and the bailee was, bound by the acts of the
partner.

PARTNERSHIP: Action on Partnership Claim—Partner Made In-
5 **voluntary Plaintiff—Nonavailable Objection.** A defendant in an
action on a partnership claim will not be permitted to interpose

the objection that one of the partners was made plaintiff without such partner's consent.

Appeal from Sioux District Court.—HON WM. HUTCHINSON,
Judge.

WEDNESDAY, JUNE 23, 1915.

ACTION to recover damages for negligence resulting in the death of plaintiff's horse. Judgment for the plaintiffs. Defendant appeals.—*Affirmed.*

J. U. Sammis and P. D. Van Oosterhout, for appellees.

Gerrit Klay, for appellant.

GAYNOR, J.—On the 20th day of August, 1913, Aalt Van Dyk brought an action in the district court claiming that he was the owner of a half interest in a certain stallion; that, at the close of the season of 1912, he turned the stallion over to the care and custody of the defendant; that defendant was a practical horseman and had dealt with horses to a considerable extent for a number of years; that the defendant took the stallion into his custody and care; that, about the middle of the month of August, he undertook to haul sand with the stallion to his farm, a distance of four miles; that the stallion was a very heavy horse, weighing about 1,900 pounds; that the weather was extremely hot, ranging between ninety and one hundred degrees temperature; that the defendant negligently hitched the horse with a light horse and put the same in charge of a green hand, or hired man not accustomed to driving horses, and proceeded to haul sand as aforesaid; that the horse was negligently and carelessly overdriven and overtaxed as a result of the use to which he was put, and, by reason of the unskillfulness of the driver, said stallion became overheated and died on the road between Rock Valley and defendant's farm by reason of the negligence of the defendant aforesaid; that the value of the half interest in the horse was

\$500; that, in the death of the horse, he was damaged to that extent, and demands judgment for \$500.

Defendant answered this petition, denying each and every allegation, and further pleading that plaintiff and one Jacob Van Beek were partners in the ownership of said stallion; that they, the partners, used said stallion for services during the season of 1912, and up to the 1st of July, 1912, and together paid the expenses and shared the profits and losses connected with said use; that on or about the 15th day of February, 1912, said partners made an oral agreement with the defendant, whereby defendant was to feed and furnish stable room for said horse whenever said partners should desire to keep said stallion at defendant's place, during the season and for the balance of the year; that, in consideration of said feed and stable room, defendant was entitled to use said stallion in ordinary farm work, and to breed the same to his mares free of charge; that after the 1st of July, 1912, and up to the time said horse died, Jacob Van Beek, one of the partners, was living at defendant's house, and had charge and supervision of said stallion while working for defendant.

Upon these issues, the plaintiff introduced his testimony. At the conclusion of plaintiff's testimony, and after plaintiff had rested, the defendant filed a motion for an instructed verdict, upon the grounds, among others, that the evidence conclusively showed that the stallion in question was held in partnership; that the partnership affairs were not settled, and no accounting had been had. Thereupon the plaintiff, through his attorney, made the following statement:

"If they want Van Beek joined here as a partner we can do it in about five minutes' time and avoid all this question. I understand he is right here in the courtroom, and that won't be denied. And we will try this thing out. The parties are all here, the witnesses are here, and there will be no occasion for making it necessary to commence another suit and go through all the preliminary expense. But if it

should be thought by the court that a partnership between Van Beek and Van Dyk existed, and there could be no partnership between any other parties as this record stands, we will ask now for a few minutes' time to amend and we will bring this action in the name of the partnership, and, as I say, will briefly amend our petition, but first the court can rule on the proposition as to whether the evidence shows there is a partnership.

"Defendant objects at this time to be forced into a new action with new parties. Plaintiff has rested, and if they want to bring a new action they are perfectly welcome, but we would not want a new action brought here at this time. The plaintiff having practically admitted that he has no cause of action if there is a partnership practically settles this question."

To which the court said:

"Well, these parties being present in court, the plaintiff may have a little time to amend and bring them in." (To all of which the defendant excepts.)

Thereupon an amended and substituted petition was filed in the name of the partnership, stating the cause of action substantially as set out in the original petition, and basing the right to recover upon the same facts therein alleged, but asking for judgment in favor of the partnership for the full value of the stallion.

Thereupon, Jacob Van Beek, the other partner, who was joined in the suit, filed a motion asking that his name be stricken from the record, stating that he refused to be a party to the record, and alleging facts which tended to exonerate the defendant from liability for the loss of the horse, and alleging that he, Van Beek, directed the use of the horse and the manner in which it was used. On motion of plaintiff, this motion was stricken from the record. Thereupon, Jacob

Van Beek filed an amendment to the amended and substituted petition as follows:

“That on the 20th day of August, 1912, the plaintiff Jacob Van Beek ordered one Lockhorst to hitch the stallion belonging to plaintiff to the wagon and haul a load of sand from Rock Valley, Iowa; that said Lockhorst did so use said horse with the full consent and authority of the plaintiff; that the use of said horse and in said manner was unknown to the defendant G. Mosterdt; that the said Lockhorst used said horse in hauling said sand in a careful and prudent manner, and was not in any way negligent in the use of said horse, and that the death of said horse was in no way caused in the manner of its use or by any negligence of the party using it or the said G. Mosterdt, defendant.”

Upon the motion of the plaintiff, this amendment filed by Van Beek was stricken from the record, on the ground that he was seeking to set up a defense for the defendant, to which Van Beek excepted.

Thereupon, the defendant filed an answer to the amended and substituted petition of the plaintiff, in which he denied every allegation, admitted that the plaintiffs were partners, alleging that they bought the stallion in controversy from the defendant for \$800, and that the defendant agreed to board and care for the stallion until March 1, 1913, and further answered that on the 20th day of August, 1912, plaintiffs, without any knowledge on the part of the defendant, instructed one Lockhorst, who was then in the employ of the defendant, to use said horse and haul the sand from Rock Valley, Iowa; that the plaintiffs were present when said sand was hauled, and had full knowledge of the manner in which said horse was used and authorized and directed the use of the horse, of which they now complain, and which they allege caused its death; that the plaintiffs are now estopped from claiming any negligence on the part of the defendant, and that if there was any negligence in the manner of its use, it was due to their own contributory negligence.

Thereupon, without further objection, the cause proceeded to final trial, defendant introducing evidence in defense, and the plaintiffs introducing evidence in rebuttal, and the defendant, evidence in surrebuttal, at the conclusion of which both parties rested.

Thereupon the defendant filed the following motion:

“(1) The evidence conclusively shows that the plaintiff Jacob Van Beek was present when this horse was used to haul sand; that he directed and instructed the driver, Gerrit Lockhorst, to so use the horse, and that it was with the full knowledge and authority and consent of the plaintiff that the horse was being used in such manner, and that the plaintiff Jacob Van Beek never at any time made any objection to said use. There is no evidence in the record to support a verdict.

“(2) There is no evidence in the record to support a verdict by the jury that the defendant was in any manner guilty of any negligence, and if there was any negligence in the use of the horse, it was at the express request and demand and the knowledge of the plaintiffs, and they by their conduct contributed to his death by their negligence.”

This was by the court overruled. Thereupon, the cause was submitted to the jury with instructions from the court. The jury returned a verdict for the plaintiffs. Judgment being entered upon the verdict, defendant appeals, and assigns the following grounds for reversal:

(1) The court erred in overruling defendant's motion to direct a verdict at the close of plaintiff Van Dyk's case, and in permitting him, over defendant's objection, to bring in a new party plaintiff.

(2) The court erred in overruling plaintiff Van Beek's motion to strike his name as party plaintiff.

(3) The court erred in striking the amendment of plaintiff Van Beek from the files.

(4) The court erred in overruling defendant's motion to direct a verdict at the close of all the testimony.

(5) The court erred in refusing to give the instruction asked for by defendant.

(6) The court erred in giving instruction No. 8 to the jury.

(7) The court erred in giving instruction No. 9 to the jury.

(8) The court erred in overruling defendant's motion for a new trial.

We need not consider any alleged error committed to the prejudice of Van Beek, if any, in overruling his motion to strike his amendment from the record, and in striking out his amendment to plaintiffs' amended and substituted petition, for the reason that Van Beek has not appealed, and is not here complaining of the action of the court in this respect. This disposes, without any further consideration, of the second and third grounds for reversal. The other grounds, we will take up in the order in which they are presented.

1. APPEAL AND
ERROR: errors
against non-
appellant:
effect.

1. The court erred in overruling defendant's motion for a directed verdict at the close of plaintiffs' testimony. This motion, so far as material to be considered here, was based

2. PLEADING:
amendments:
substituting
partnership
entity for in-
dividual
plaintiff.

on the thought that an action could not be maintained by one partner to recover a partnership debt. There appears to have been no ruling on this motion. On the request of the attorney representing the plaintiff, the partnership was substituted as plaintiff in the action, and the cause proceeded to trial upon the issue of fact as originally tendered, the partnership being conceded by both parties, in the further progress of the trial, to be the real party in interest. It is claimed, however, that the court erred in allowing the plaintiff to file an amended and substituted petition,

and in changing the parties plaintiff in the suit. It is conceded that this action was originally brought in the name of one of the partners, upon a cause of action, if any, existing in favor of a partnership of which the plaintiff was a member. At the conclusion of plaintiff's testimony, it developed that the cause of action existed in favor of this partnership, and the motion was predicated upon the thought that the plaintiff, as a member of the firm, could not maintain an action to recover upon a partnership claim.

Sec. 3468 of the Code of 1897 provides: "Actions may be brought by or against a partnership as such."

Our court has uniformly held that a partnership is a distinct, legal entity, capable of transacting business and making contracts, and may sue and be sued in a partnership name. See *Brumwell v. Stebbins*, 83 Iowa 425.

The question then is, did the court err in allowing the partnership to be substituted as plaintiff in a case brought by one of the members of the firm upon a partnership debt?

To allow amendments is the rule; to deny them, the exception. As said by this court, "The scope of a new pleading is limited to strengthening, developing, or re-enforcing the original cause of action, or of enlarging the extent, or changing the relief sought. Then it meets the very purpose for which such pleadings are allowed." See *Kean v. Rogers*, 146 Iowa 559.

Did the amendment in this case go beyond the scope and purpose for which amendments are allowed, to wit, the furtherance of justice, and the avoidance of nonsuits upon purely technical grounds?

The action of the court below was not without authority. In *Myers v. C. B. & Q. Ry. Co.*, 152 Iowa 330, a husband brought a suit to recover for the death of his wife. A demurrer was interposed to his petition on the ground that he was not a proper party to maintain the action. An amended and substituted petition was filed by F. K. Myers, as administrator of the decedent, claiming damages to the estate. De-

fendant moved to strike this amended petition on the ground that it changed the parties plaintiff, and alleged a new cause of action. This motion was overruled and exceptions taken. An answer was subsequently filed. The court held that there was no error in allowing the amendment. The court said: "Where a party sues in his own right, he may, if the facts warrant, amend his complaint so as to make the suit stand in his representative capacity, and conversely, if he sues in his representative capacity, he may be allowed to amend by declaring as an individual; and in either instance it is not considered a substantial change in the cause of action,"—citing authorities.

The court further said, in substance, that, when there is an appearance to the action, and the defendant tests the right of the named plaintiff to maintain the action, the name of the proper parties plaintiff may be substituted in the action by an amended pleading, subject, of course, to an apportionment of the costs, and the right of the defendant to a continuance, if taken by surprise. If this is not the rule, the action must abate and another be brought. This, under the statute, should not be the rule unless substantial justice so demands. The statute provides in terms that the court, in furtherance of justice, may permit a party to amend any pleading by adding to or striking out the name of a party. The original plaintiff was without capacity to sue upon a partnership claim. The transaction upon which the action was based remained the same. It was the same cause of action that was sought to be enforced after the substitution of the partnership. We think this case is authority for the court's action in allowing the amendment by substituting the partnership as plaintiff in the case. Further than that, the defendant made no motion to strike the amendment from the file, but responded thereto by answering; and nowhere in his motion for a directed verdict did he raise the question here urged. We think on this point there is no ground for reversal.

The next error assigned is that the court erred in overruling defendant's motion for a directed verdict at the close of all the testimony. This and the eighth error assigned may

3. ANIMALS: negligent handling: sufficiency of evidence. be considered together. The eighth error is that the court erred in refusing to sustain the motion for a new trial. The motion for

a directed verdict was based upon two grounds, both of which involve the same question as presented in the motion for a new trial, to wit, that the evidence is insufficient to justify the verdict. In the view we take of this case, these assignments cannot be sustained, for the reason that it is not in dispute that the horse in question was placed in the custody and care of the defendant by the partnership. There is a controversy as to the terms upon which he was given to the defendant. The plaintiffs' testimony is that the defendant was to keep the horse until the season of 1913 and have the privilege of breeding his mares; that he was to give the horse exercise to keep him in health, in good shape. The defendant says he knew how to take care of horses; was an experienced horseman; that the horse was perfectly healthy, in good condition, and had never been sick during that season.

Ed Moss testifies that, on the day the horse died, he met Lockhorst, the hired hand of the defendant, driving the stallion and another horse hitched to a wagon. This was about a mile east and three miles south of Rock Valley, and about half a mile from defendant's place. He said that he noticed, when he saw Lockhorst coming towards him with the stallion and the other horse, the horse stood still, or wanted to stand still. When he got up to him, he was standing still. The horse fell practically immediately after that. The horse weighed about 2,000 pounds; was in good condition. Observed no symptoms of colic about the horse. The horse driven with the stallion weighed about 1,100 pounds. This was about 11:00 or 12:00 o'clock in the day. At the time the horse fell, he was going up a steep hill. The wagon was loaded with sand.

It was admitted by the defendant that Lockhorst was working for the defendant, and at the time the horse died, was driving him for the defendant.

It further appears from the testimony that after the death of the horse, the defendant said the stallion was not well the night before, and that he thought he had kidney trouble the night before; that he was all right in the morning, so he told the boys to hitch him up to the wagon again and they did. There is evidence that defendant told the boys to put the horse on the wagon to haul the sand. There is a controversy as to who told Lockhorst to hitch up the horse.

Dick Van Beek testifies that the defendant is his step-father; that he was living with and working for the defendant at the time of the occurrence complained of; that the horse was in good condition prior to his death; that he fed the stallion the morning he died; that he ate his feed and was in good condition; that he did not see the stallion hitched up; that his brother, Jacob Van Beek, was foreman of the place, and when the father was not at home, the plaintiff Jacob Van Beek gave orders as to what should be done on the farm.

Lockhorst testifies that Dick Van Beek, son of defendant, hitched the stallion to the wagon; that he had an old horse with him. Jake, the plaintiff, went along with another wagon; that Jake was first ahead and then Lockhorst got ahead; that coming back, Jake stopped with his team at Rock Valley.

The jury might well have found that the death of the horse was not due to the use, but to the manner in which it was used.

Jacob Van Beek testifies that he directed the hitching up of the horse for the hauling of the sand.

These were all questions of fact for the jury, but the evidence shows that the defendant stated that he told the boys to hitch the horse to the wagon. We do not know what the fact is about this matter. The jury determined it adverse to the defendant. It appears without controversy that Lockhorst was in the employ of the defendant, as was also Jacob

Van Beek; that they were engaged in defendant's business; that whatever they did with respect to the horse was done for the defendant, and not for the plaintiff partnership; that they were servants of the defendant, and were performing duties assigned them by the master; their negligence was the negligence of the defendant. It was the duty of the defendant not negligently to injure this horse while in his custody. That was the duty he assumed to the partnership when he took charge of the horse. If the horse was negligently driven and handled, and, as a proximate result of such negligence, he died, the defendant would be liable on the theory of *respondeat superior* for the negligence of those in whose custody he had placed the horse, even though for a temporary purpose, providing the injury occurred while in the performance of the servant's duty to the master. The defendant in his argument says:

"There is little or no dispute about the facts in this case. We concede for the purpose of this appeal that the use of the horse at the time and in the manner shown was negligence, and caused his death by apoplexy."

4. PARTNERSHIP: It is next contended that the court erred
 partners: in refusing to give instructions asked by the
 negligence of: defendant. This is the fifth error assigned.
 when binding on partner-
 ship. The instruction asked by the defendant is
 as follows:

"Each member of a partnership firm is the agent of and the representative of every other member, and every act done by one member within the scope of the partnership business is binding upon every other member, regardless whether the commission of such act at the time, or before it was committed, was known to the other member of the firm. You are therefore instructed as a matter of law that if you find by a preponderance of evidence that the plaintiff, Jacob Van Beek, on the 20th day of August, 1912, was present and knew that the

stallion was used to haul a load of sand from Rock Valley, that he directed and instructed Lockhorst, the driver of the stallion at the time he died, to use said stallion to haul said load of sand, and at no time made any objections thereto, then the plaintiffs were guilty of contributory negligence, and your verdict must be for the defendant, and you will so find."

The court, however, in its eighth instruction, gave the above instruction substantially as asked, and then added:

"If, however, you find from the evidence that one of the partners, Jacob Van Beek, was the stepson of the defendant, and at the time in question was living with and working for the defendant, and in the defendant's employ, and under defendant's supervision managing and directing his father's, the defendant's, business, in the absence of the defendant, and at the time in question, he was acting for and in behalf of his father in using said stallion in hauling sand, and was not acting in any way for the partnership in question, and that what he did at said time in authorizing, permitting and directing the use of the said horse was done for the sole use and benefit of the defendant, his stepfather, then and in that case, the plaintiffs would not be guilty of contributory negligence, and they would not be estopped from maintaining this action."

The defendant, in his fifth assignment of error, complained that the court did not give the instruction asked, and in the sixth assignment of error, complained that the court gave this eighth instruction. The fore part of instruction 8 is in words of the instruction asked; therefore plaintiff's complaint that the court did not give the instruction asked has no basis in this record.

The complaint of the eighth instruction relates to the latter part, in which the jury are told that if Jacob Van Beek, at the time of the injury, was acting for the defendant, and not for the partnership, and that what he did, if he did

anything, in authorizing, directing, and permitting the use of the horse, was done solely as servant of the defendant, and in discharge of duties which he owed the defendant as a servant, the partnership could not be charged with contributory negligence on account of the action of Jacob Van Beek, touching the matter. As said before, a partnership is a distinct entity and recognized as such in the law. The members of the firm are simply the agents of the entity and can only bind it within the scope of their legal authority as such agents. There is no question but that one may be agent of two parties, but as such, can bind only the one for whom he acts, when the act is within the scope of his agency. If the jury should find, as a matter of fact, that Jacob Van Beek was the agent of the defendant at the time, acting for and in behalf of the defendant and in the defendant's business, and not for the partnership or within the scope of his agency as a member of the firm, then his acts clearly bind the party for whom he was acting, and that was all the court told them in this instruction. The court simply said: If Van Beek was acting as agent for the defendant, acting for and in behalf of the defendant in using the stallion, and not acting in any way for the partnership, and that what he did was done for the sole use and benefit of the defendant, then, in that case, the legal entity known as the partnership would not be chargeable with contributory negligence by reason of his act. We think there was no error in this instruction under the record made in this case. Before the act of one partner can be charged against the firm as constituting negligence, and create liability on the part of the firm for the act, it must appear that the act was done within the scope of his agency and authority to act for the partnership. The negligence must have been committed within the scope of the partnership or in the furtherance, or attempt to further, the interests of the partnership. His act must be the act of the partnership, to be binding upon it. In nothing that Jacob Van Beek did on this day did he assume to or act for the

partnership. All that he did and all that he attempted to do was in the interest of this defendant, and as servant of the defendant.

As bearing upon this question, see *Hubenthal v. Kennedy*, 76 Iowa 707. In this case it is said, where one is sought to be charged with an act done by a partner: "Kennedy did not assume to bind anyone but himself by his agreement, but it was a mere personal arrangement between him and the plaintiff. If it should be conceded that he and Dickinson were partners, still, as he did not assume to contract for the firm, it was not bound by the agreement." See also, as bearing upon this question, *Knox v. Buffington & Co.*, 50 Iowa 320; *Boardman & Gray v. Adams & Hackley*, 5 Iowa 224.

In *Mathre v. Story City Drug Co.*, 130 Iowa 112, this court said: "It is fundamental . . . that the partnership and each partner are liable for the acts of the others when they are acting in the ordinary course of the business of the firm, or are authorized to so act. On the other hand, a firm or a partner will not . . . be liable for the wilful or negligent tort of a partner acting beyond the scope of his authority." See also *Gwynn v. Duffield*, 66 Iowa 708, 712; *Randolph Bank v. Armstrong*, 11 Iowa, particular point at page 518.

The next contention is that the court erred in giving the ninth instruction to the jury. In this ninth instruction

6. PARTNERSHIP: action on partnership claim: partner made involuntary plaintiff: nonavailable objection.	complained of, the court told the jury in substance that an action for damages to partnership property must be brought in the name of the partnership; that one partner has the right to institute the suit for the partnership, and that he had a right to join his partner in such a suit, even against the partner's objection.
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There is nothing prejudicial in this statement of the law, so far as this defendant is concerned. There is no contention that this suit was not based upon damage to partnership property. The whole theory of the trial, after the filing of the

substitute petition, was that the action was being prosecuted by the partnership. In view of the action of the other partner upon the trial, we think this instruction was peculiarly pertinent. We find no error here.

On the whole record, the cause ought to be and is—*Affirmed.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

ANNA M. DE CASTELLO et al., Appellants, v. THE CITY OF CEDAR RAPIDS et al., Appellees.

DEDICATION: Essential Elements—Intent to Dedicate—Actual Dedication—Acceptance. To constitute an express or implied dedication of land to public use, there must exist (a) an actual intent to set aside the physical property to public use, evidenced by unequivocal and convincing evidence, (b) an actual setting aside of the physical property to public use, *in praesenti*, and (c) an express or implied acceptance *in praesenti* or *in futuro* by the public, of the dedication. Evidence reviewed and held not to be of that character sufficient to establish dedication of land for a public street.

Appeal from Linn District Court.—HON. MILO P. SMITH, Judge.

THURSDAY, JUNE 24, 1915.

ACTION to enjoin the defendant city from opening up a street over land owned by the plaintiff. The city's claim is based on an alleged dedication of the strip in controversy to public use. Decree below for the defendant. Plaintiff appeals.—*Reversed.*

B. L. Wick, Geo. F. Buresh, and M. P. Cahill, for appellants.

Wm. Chamberlain and C. F. Luburger, for appellees.

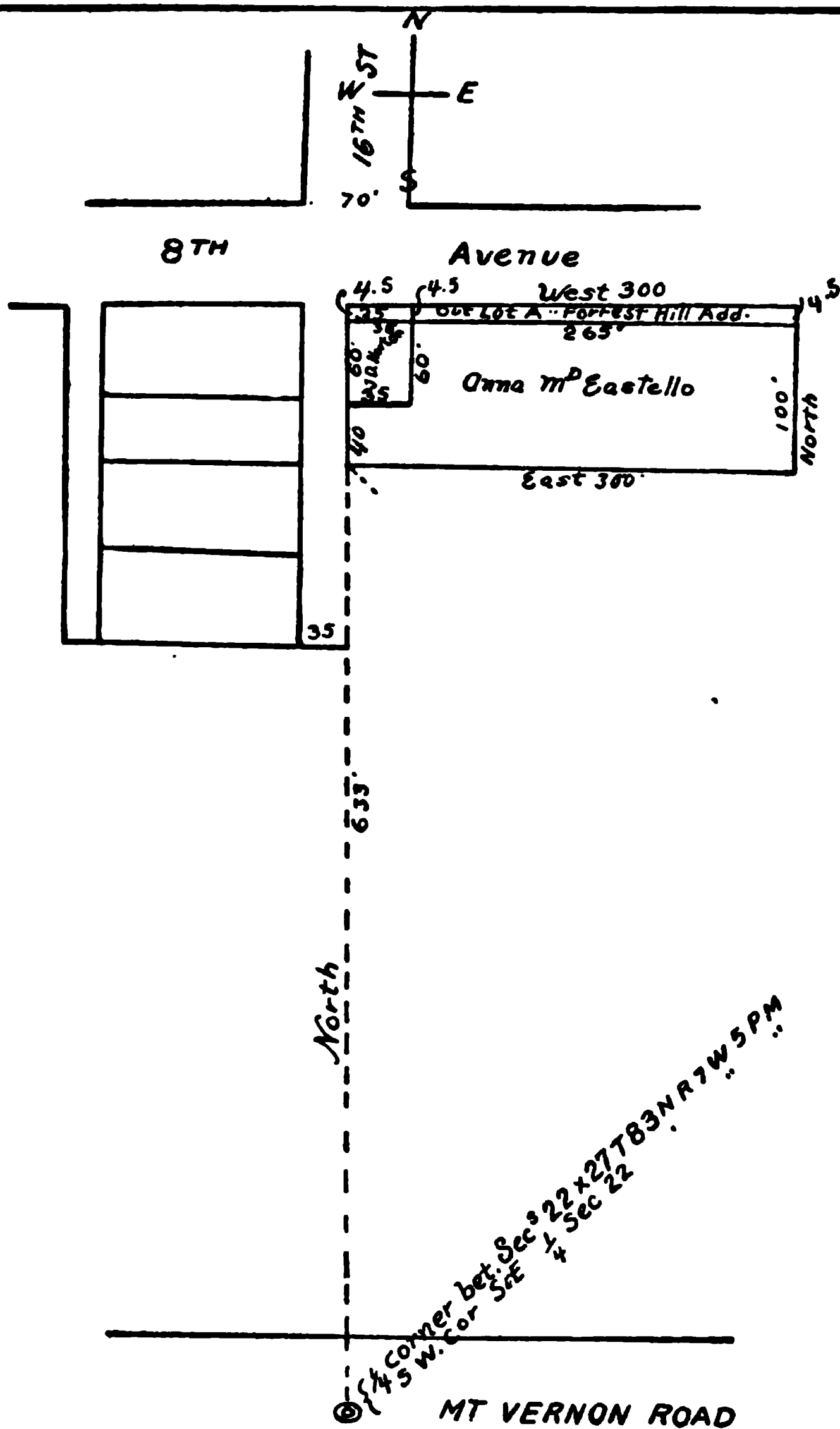
GAYNOR, J.—This is an action in equity brought to enjoin the defendant from grading a certain piece of ground claimed

by the defendant to be an extension of Sixteenth street. The plaintiff claims to be the owner of the land, and has contracted to sell the same to the other plaintiff, Norton.

The contention of the defendant is that, prior to the defendant's entering upon this land for the purpose of opening the street, the plaintiff had dedicated a strip thirty-five feet wide, along the west line of her land, extending from Eighth avenue south about sixty feet. Sixteenth street runs north and south. Eighth avenue runs east and west. Sixteenth street, north of Eighth avenue, has been opened and used to its full width, seventy feet. South of Eighth avenue, and in a line with Sixteenth street and in a line with the east side of North Sixteenth street, is the land in controversy. The owners of the land south of Eighth avenue and west of the land in controversy have dedicated thirty-five feet to the use of the public for a street. The defendant is now seeking to open Sixteenth street south of Eighth avenue to the full width of seventy feet, thus seeking to appropriate thirty-five feet off the west end of plaintiff's land. Plaintiff's land is immediately south of Eighth avenue and east of Sixteenth street extended, together with the portion now in controversy. We submit a plat herewith which shows the location of the *locus in quo*.

The controversy here can be presented without a statement of the issues made by the parties in the pleadings. The plea of the defendant is that the ground in controversy was dedicated by the plaintiff and accepted by the public as a street; that this dedication was orally made, and was made about the 30th day of March, 1904.

Dedication is distinguishable from a grant in that it requires, to make it effectual, no specific grantee *in esse* at the time of the dedication. It involves the idea of a giving to the public for public use, a certain right or easement in land for a specific public purpose. A dedication is a devotion to public use of land, or an easement in it. To make it effectual, it is not necessary that it appear that there be a



Cedar Rapids, Ia., May 23, 1913.

The above is a correct plat of land deeded to Ame M. De Castello, described as follows: Commencing at a point 633 ft. north of S. W. Cor. of S. E. $\frac{1}{4}$ sec. 22, T. 83 N., R. 7 W., 5 P. M., thence east 300 ft., thence north 100 ft., thence west 300 ft., thence south 100 ft. to point of beginning, also of out lot "A" of Forrest Hill Add.

Surveyed and platted by us.

M. TSCHIRGE & SONS,
Engineers,
314 Masonic Bldg.

distinct grantee, or a corporate body in existence at the time of the dedication, to whom the dedication is made and by whom it may be accepted. It involves an act by the owner, from which it is made to appear that he has set aside a portion of his land to the use of the public for a public purpose.

Private property cannot be taken for public use without first making or providing for compensation. The party may, however, give his land, or an interest in it, to the public use. Before, however, it can be held that he has done so, it must be clearly shown by some unequivocal evidence that he has parted with all right and control over the land inconsistent with the purpose to which he has devoted it. The manner in which the dedication is made is not a material matter. Unlike other interests in land, it may be shown by parol. The intent to dedicate, and the dedication and acceptance by the public, or by the party to whom dedication is made, are essential to constitute a completed dedication.

The dedication of land to a public use does not necessarily involve a parting with the fee. It involves rather, a right to the use of the land against interference from the dedicant. After a complete dedication and acceptance, the one making the dedication is thereafter estopped to make any claim to the land inconsistent with the use to which he has formally and solemnly devoted it.

In *Hurley v. City of West St. Paul*, 83 Minn. 401, 86 N. W. 427, it is said, in substance, that common law dedications are divided into two classes, expressed and implied. In either, however, it is necessary and essential that there be a surrender or an appropriation of the land by the owner to the public use. An express dedication is evidenced by some explicit or positive declaration, or manifestation of intent to surrender the land; an implied dedication, by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn. Intent to dedicate is indispensable, and without the intent shown in some way, there can be no valid dedication.

Intent to dedicate, however, is not sufficient. While the *quo animo* must exist to make the dedication, to devote the land to the public use, to give it or grant it to the public use, yet there must be actual setting aside of the physical property to the public use, accompanied by an intent that it be so used.

A dedication, to be effectual, must be *in praesenti*. There must be a present actual parting with the use of the property to the public, manifested by some unequivocal act indicating clearly an intent to so devote it. However, it is not necessary that it be put to the particular public use immediately upon the dedication. This may follow at some future time. While the dedication must be *in praesenti*, the acceptance or devotion to public use may be *in futuro*.

The extent of the dedication, its character and scope, depend, of course, upon the intention of the dedicator, as manifested in the act of dedication, and are to be gathered from all the facts and circumstances that attend the situation.

In *O'Malley v. Lumber Co.*, 141 Iowa 186, it is said: "A highway may be dedicated by parol, without deed or other written evidence thereof, . . . but it is a cardinal principle of the law on this subject that the intent to dedicate must clearly appear, and the acts and circumstances relied on to prove such intent must be unequivocal and convincing."

While we have said there must be an acceptance of the thing dedicated in order to make the dedication complete, this acceptance may be implied sometimes, where the thing dedicated is of such a character that the use to which it is dedicated is so clearly beneficial to those to whom the dedication is made that the law will presume an acceptance, and it sometimes happens that the thing dedicated is of such a nature that it cannot be devoted exclusively to the public use; so it becomes necessary, in considering the question of dedication and the use to which it was dedicated, that we consider the thing dedicated and the public use to which it is to be put after the dedication is complete. But whether or not it be devoted exclusively to the public use by the dedica-

tion, the fact that private rights are involved in the use does not destroy the dedication, nor entitle the dedicator to disturb the use, by those to whom it was dedicated, for the purposes intended.

A city is not bound to accept land, though expressly dedicated to it for public use. Its rights in the land and the use or its duty to the public arise only when it has accepted the dedication, or has done some act which unequivocally shows an intent to assume jurisdiction over the thing dedicated. There is a difference between an offer to dedicate and an actual dedication. An offer to dedicate does not become complete until there is an actual acceptance by those to whom the offer is made.

In *Holdane v. Cold Spring*, 21 N. Y. 474, 477, it is said: "The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication."

In *Lownsdale v. Portland*, 1 Ore. 381, 404, the Supreme Court of that state said: "The burden of proof rests upon the defendant to show a dedication. It must be clear and satisfactory. . . . The security and certainty of the title to real estate are among the most important objects of the laws in any civilized community. Around it the law has thrown certain solemnities and formalities, so that the fact may be known and read of all men. What a man once has he is not to be presumed to have parted with, but the fact must be shown beyond conjecture. And although, in the case of streets and public grounds in towns, from the nature of the case a dedication may be shown by acts resting on parol, they must be of such a public and deliberate character as makes them generally known, and not of doubtful intention."

It is essential, to constitute a dedication, that the donor

should intend to set apart the land for the use of the public. There can be no dedication unless there is a present intent to appropriate the land to public use. See Elliott on Roads and Streets (Ed. of 1890), p. 92. 2 Dillon on Municipal Corporations, 636. With these well-settled propositions of law in mind, we proceed to the consideration of the facts shown by the evidence on which the rights of these parties must stand.

It appears that plaintiff was the owner of a certain strip of land south of the land in controversy, and abutting on what would be Sixteenth street if extended south; that while she was the owner of this land, the title was in her husband. In 1907, she conveyed this land to one Mrs. Cisne, and included in the conveyance the thirty-five feet which it is now contended by the defendant was by her dedicated to the public. It appears that the sale was made by one Mally, a brother of the plaintiff, Mrs. De Castello, who claimed to be acting for the plaintiff. It appears that no reservation was made in the deed of any strip of land for a street. Mally claims, however, that, at the time he sold to Mrs. Cisne, he told her that Sixteenth street would be extended, and that thirty-five feet off the west end of the lot conveyed would be used for a street. He does not claim that he was authorized to make this statement by Mrs. De Castello, nor is it claimed that the plaintiff knew at the time that such a statement was made. The title, however, was in her husband, and Mally claims that her husband was present at the time these statements were made. This is denied by the husband.

It appears that, after this conveyance was made to Mrs. Cisne, this land was used the same as before; that fences were built along the west end and up to the original line; that no act was done after that indicating any intention in the part of Mrs. Cisne to devote the land to public use. It would rather seem from the testimony that she at least did not consider that the public had any right in it. Mrs. Cisne continued to occupy the land conveyed to her, including this

strip on the west. It appears that subsequently the intervener, Mally, purchased this property from Mrs. Cisne, and he and the other intervener, B. F. Youtsey, are now the owners of it; that they purchased it with full knowledge of the true situation as to the land in controversy. They knew when they purchased it that plaintiffs had refused to give a street over this thirty-five feet in controversy. The reason Mally purchased it back, as he says, was that he found out De Castello would not give this land for a street, so he traded a house and lot to Mrs. Cisne for the lot to redeem his word.

The evidence discloses that nothing was ever said by the De Castellors touching a disposition on their part to dedicate the land after the conveyance to Mrs. Cisne; in fact, the record is very barren of any suggestion of statements made by either of the De Castellors. All that was said was said touching the thirty-five feet on the west end of the land deeded to Mrs. Cisne, and this was said by Mally, who is now the owner, if said at all. Nor does there anything appear, except suggestions made in the evidence by Mally, that there was any talk of dedicating any portion of the land north of that conveyed to Mrs. Cisne. It appears that there was never anything done to carry out any dedication in the way of clearing the ground for use as a street, or in the building of sidewalks. Nor is there any indication of any use by the public of this land. Whatever road there was across this thirty-five feet in controversy was there for the use of the occupants of the house conveyed to the Cisnes alone. It does not appear clearly that the plaintiff ever said anything publicly that she would dedicate this thirty-five feet or had dedicated it. It appears that at the time this dedication is claimed to have taken place, Eighth avenue was open to the west, but not to the east; that subsequently Eighth avenue was extended. Plaintiff then purchased the strip of land lying north of her land and between that and Eighth avenue, and shortly after obtaining this strip, a permanent sidewalk was built on Eighth avenue along the south side, the length of her prop-

erty, and across the north end of the land now claimed to have been dedicated to the public, and goes to the west edge of the thirty-five feet in controversy. It appears that, at the time this property was sold by Mrs. De Castello to her co-plaintiff, Norton, there was a wire fence on the west end and running north and south; that there was a row of raspberry bushes on the west end of this thirty-five foot strip. It appears that there had been a wire fence and trees on the west end of this land in controversy, up to a very short time before this action was commenced. It does not appear that there had been any travel over this strip by the public at any time. The evidence shows that there was a fence on the west side of this strip running north to Eighth avenue; that the first fence put there was a five-board fence. Finally that fence was taken down, and a barbed wire fence put in; that most of this barbed wire fence was there at the time this action was commenced; that part of this thirty-five feet has been used by the De Castelllos as a lawn and garden during all the time.

The witnesses who testified to what was said by Mally at the time this property was sold to Cisne say that Mally did not say how wide the street would be extending north from the property deeded to Cisne. The most that can be claimed is that, at the time Mrs. Cisne bought this property, thirty-five feet were measured in front of her property with a view to locating the house back far enough so that it would not be interfered with in the event a street was opened in front.

Mally testified:

“When I sold De Castelllos the house, Sixteenth street was laid out north from Eighth avenue. We concluded that the street would be open to Mt. Vernon avenue south, and we said, ‘We will allow thirty-five feet for a street.’ We put the house far enough back to allow for a front lawn and also to plant trees there, and put in a sidewalk, so that if

they lowered the grade upon the street, the house would be in a proper place, and we planted the trees back because we knew that when the street was opened up, it would have to be graded, and, consequently, the trees were planted on the lot line so not to disturb them after the city had graded the street and put down the walk. At the time I sold to Mrs. Cisne, there was no street, only a partial street west of my lot."

He further says that he told Mrs. Cisne that he would give her a deed to the whole lot, but that she was to understand that when the street was opened up, it belonged to the city.

Whether or not this piece of land was dedicated by the De Castellós to public use at the time of the making of the deed to Mrs. Cisne depends entirely upon the testimony of Mally and Mrs. Cisne, and their testimony is absolutely contradicted by the testimony of both Mrs. De Castello and her husband, both as to what was said by Mrs. Cisne at the time and as to the authority assumed by Mally in making this statement.

We do not understand, from the record, that Mally claims that any authority was given to him to dedicate any portion of this land as a public street. The dedication seems to rest upon the thought that he was the agent of Mrs. De Castello, or her husband, in making the sale to Mrs. Cisne, and that as agent, he spoke for and in their behalf, and assumed that the representations made by him were binding on Mrs. De Castello, the real owner. Whether or not, as agent for the sale of this particular strip of land to Mrs. Cisne, his authority extended so far as to bind her by representations made to Mrs. Cisne touching the giving of the land in front of this land conveyed as a street, we need not inquire. There is no evidence of any authority on his part to bind her by any agreement to extend the street north of the land conveyed. Both Mr. and Mrs. De Castello testified that Mally

was not authorized to make any representations to Mrs. Cisne that they were going to give the land in controversy as a street. Mrs. De Castello further testified, "I never told anyone that I had, or was willing to give this property for a street, and never authorized my brother, as my agent, to make such representation."

Lewis Zika testified that he was commissioner of streets and public improvements; that he ordered the grading done on South Sixteenth street; that the strip of land in controversy had never been used up to last May; that he heard a year ago that this thirty-five feet in controversy had been dedicated, and he said that the city had never accepted it; that he was asked to open up the street; that he examined it and found there was nothing beyond this lot, and it would not be worth while opening it; that Mally then informed him that the city could have this piece of ground at any time it wanted it; that he never heard from Mrs. De Castello with reference to it.

We have not set out the testimony of Mally and Mrs. Cisne for the reason that it is absolutely denied by the De Castellós, and for the further reason that the subsequent conduct of the parties is inconsistent with their claims. Their testimony, as it appears in this record, is very fragmentary, and by it a dedication is sought to be established upon a most uncertain foundation, the memory of what was said by parties to a transaction dating many years before they were called to testify to it, and concerning a matter about which no controversy appears to have been had since the alleged statements were claimed to have been made. The memory of Mally is quickened into sensibility by an immediate interest in the subject-matter of his testimony, but this interest does not make it any more reliable as a basis for ascertaining a fact. Testimony as to verbal declarations, or statements made a long time prior, is the most uncertain and unsatisfactory basis for ascertaining the truth. The change of a word, the different phrasing of a sentence, may give it an entirely

different meaning from what was intended by the parties. With nothing but the memory of these witnesses as a basis on which to rest a finding as to what was said and done by these De Castellos touching this matter, we do not find that certainty which the law requires when private property is to be taken for a public use without compensation. Usually, when parties have deliberately done an act, or pledged themselves to an act, their subsequent conduct is not inconsistent with their mental attitude.

A careful reading of this record satisfies us that neither the intervener Mally nor the defendant have been misled by any act of these parties plaintiff to their prejudice; nor have they put themselves in any position to invoke an estoppel against the plaintiff. If the city desires a street, there is a plain, speedy and adequate method open to the city by which it may secure this land for a public use; but, upon this record, we cannot say that they have acquired any right in this property for use as a public highway.

We think, under this record, the cause should be and is —*Reversed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

ROBERT DICKINSON, Appellant, v. IRA D. DAVIS et al.,
Appellees.

GARNISHMENT: Rights Acquired—Defendant in Execution Parting
1 **with Interest—Corporate Bonds.** It is hornbook law that a garnishment reaches whatever interest the defendant in execution has in the property at the time the garnishment is served *and no more*. So held where the defendant in execution had, prior to the service of the garnishment, assigned all his interest in certain corporate bonds held by the garnishee as collateral security.

FRAUDULENT CONVEYANCES: Conveyances—When Vulnerable to
2 **Attack.** It is elementary that a conveyance cannot be overthrown in the absence of a showing of (a) fraud or (b) want of consideration.

GARNISHMENT: Order Not Affecting Plaintiff in Execution—Futility of Objection. A plaintiff in execution who, by his garnishment, reaches no property of the defendant in execution, because of a good-faith assignment of the property prior to the garnishment, cannot complain of an order of the court affecting the assignee only.

Appeal from Polk District Court.—HON. W. S. AYRES, Judge.

THURSDAY, JUNE 24, 1915.

THIS case involves a controversy between the plaintiff in garnishment and the intervener as to the ownership of property in the hands of the garnishee. Plaintiff's contention is that at the time of the garnishment the property belonged to the defendant in execution. The intervener claims to be the owner by virtue of purchase and assignment to him by the defendant in execution before garnishment. Judgment for the intervener. Plaintiff appeals.—*Affirmed.*

Henry & Henry, for appellant.

L. A. Smyres and *W. H. Stiles*, for W. H. King, intervener, appellee.

Brown & Brammer, for Central State Bank, L. M. Darling and Victoria C. Darling, garnishees.

W. H. Stiles, for defendant, Ira D. Davis.

GAYNOR, J.—The plaintiff, Dickinson, having recovered a judgment against the defendant, Ira D. Davis, caused an execution to issue, and the Central State Bank to be served with notice of garnishment. The garnishment notice was served on the 25th day of November, 1912. On that date, Davis was indebted to the Central State Bank, garnishee, in the sum of \$4,224.66 on a certain promissory note given by Davis to said bank. On the day of the garnishment, the Central State Bank held, as collateral security for the payment of said note, the following property: One note of \$4,510.63, signed by Victoria C. Darling and Loren M. Darling, bearing date May 3, 1911, due December 8, 1911, in-

terest 8%, payable to the order of the defendant, Ira D. Davis, and by him endorsed in blank and delivered to the bank. The bank also held as collateral security for the payment of the note of Ira D. Davis, aforesaid, two 5% bonds of the Iowa Loan & Trust Company for \$500.00 each, and one 5% bond for \$1,000.00 issued by said company to Ira D. Davis, and due April 1, 1913.

At the time the garnishment notice was served, no part of the Davis note to the garnishee of \$4,224.66, either principal or interest, had been paid, and no part of the Darling note had been paid except the sum of \$930.00 paid by the Darlings to Davis. At the time of the garnishment, the Central State Bank had a first and paramount lien on the bonds aforesaid and upon the Darling note for the payment of the Davis note of \$4,224.66. Since said Darling notes were deposited with said bank as collateral security, the Darlings paid to the bank on account thereof \$1,000.00, February 4, 1913, and \$175.00 on March 28, 1913. These sums so paid were endorsed by the garnishee upon the Davis note.

Upon the trial of this case, it was stipulated that the garnishees, the Darlings, may be permitted to pay to the Central State Bank the balance of their note, and thereupon shall be entitled to have the mortgage given to secure the note canceled of record, and all claims against them as garnishees discharged. After the making of this stipulation, the Darlings did pay to the bank the balance due upon their note to Davis held by the bank as collateral, and they were discharged from liability as garnishees. The controversy here is between the plaintiff, garnisher of the bank, and W. H. King, who was permitted to intervene in the case.

It appears that prior to the garnishment herein, Ira D. Davis made the following written assignment:

“For value received I hereby assign, transfer and set over to W. H. King, of Des Moines, Iowa, all my right, title, and interest in and to three debenture bonds of the Iowa Loan

& Trust Company of Des Moines, Iowa, as follows: One Debenture series No. 14, No. 17 for \$1,000.00. One debenture series E. No. 20, \$500.00. One debenture series E, No. 21, \$500.00."

On the 18th day of November, Davis served upon the bank garnishee the following notice:

"I have this date made an assignment of the three debenture bonds of the Iowa Loan & Trust Company of Des Moines, Iowa, to W. H. King, subject to your lien on the same as security for loan to me. Upon the payment of the money due you by me, on or about February 1, 1913, you will deliver to the said W. H. King the said bonds as his property, and this order shall be your receipt from me for said delivery."

It appears that, prior to the making of this assignment and the service of this notice, King had loaned the defendant Davis the sum of \$2,000; that at the time the assignment was made, King delivered to Davis the note given to evidence this loan. It appears that this assignment of these debenture bonds was made by Davis to King in full satisfaction of the indebtedness evidenced by the note given by Davis to King, heretofore referred to. The evidence on this point comes from Davis and is as follows:

"I was the owner of the debenture bonds at the time they were left with the Central State Bank as collateral—I had borrowed \$1,000 of W. H. King in 1909 and had given him my note for that amount at 7 per cent interest. In 1910, I paid the interest on this note and borrowed \$1,000 more, taking up the note for \$1,000 and giving my note for \$2,000 due November 11, 1912. About the time the \$2,000 note came due, Mr. King asked me if I was able to pay him the money, and I told him I did not have it, but that I had the \$2,000 in debenture bonds of the Iowa Loan & Trust at the Central

State Bank. That they were up as collateral on a loan, but that the Darling notes and mortgage were assigned as collateral and that they would satisfy the loan I had, and that the bonds would be clear, and that I would make an assignment of these bonds to him for my note. We agreed to meet on the 18th day of November at the office of L. A. Smyres, and close up the deal. I went with Mr. W. H. King on the 18th day of November, 1912, to Smyres' law office in the Iowa Loan & Trust, and Mr. Smyres wrote out an assignment of the bonds from me to W. H. King, subject only to the interests of the Central State Bank, and I signed it, and delivered it to Mr. King, and he delivered to me my note of \$2,000 in consideration of the assignment of the bonds. At the same time and place, Mr. Smyres prepared a notice to the Central State Bank for me, saying that I had made an assignment of the three debenture bonds to W. H. King, which I signed and delivered to King."

Upon this record, the district court adjudged that the Darlings be discharged from any liability as garnishees, upon the payment to the bank of the balance due upon their note to Davis, and ordered that the amount paid by the Darlings be by the bank applied to the payment and discharge of the note held by the bank against Ira D. Davis; that if the amount paid by the Darlings was insufficient to discharge the Davis note, the proceeds from the bonds of the Iowa Loan & Trust Company held by the bank be then applied by the bank upon the Davis note, or so much thereof as would satisfy the note, and that the balance of the proceeds of the bonds be paid over to the intervener King, and that thereupon the garnishee bank be discharged from any further liability on the garnishment. From this order, the plaintiff appeals and contends that the court erred in holding that the intervener, King, became the owner of the proceeds of the debenture bonds, subject only to the rights of the Central State Bank, for the following reasons:

First. The bank held the title to the bonds, and said

bonds, with the other collateral in the hands of the bank, exceeded the amount of its claim against Davis; that plaintiff in the garnishment proceeding was therefore entitled to a contingent judgment against the bank, either giving it a right to the collateral after paying the bank's claim, or that there should have been an order entered providing that the bank should collect the amount due on the collateral, and, after extinguishing defendant's own debt, pay the remainder over to the plaintiff.

Second. That the title to the bonds was in the Central State Bank, and Davis could make no valid transfer of said bonds; that the most he could do was to transfer his interest in the proceeds of the bond, after the bank had satisfied its own claim from the proceeds; that the assignment upon which the intervener relies did not give him the right to the proceeds of the bonds, after the bonds had been collected, but was an attempted assignment of that which had already been assigned to the bank, to wit, the bonds themselves.

Third. Because the instrument of assignment was fraudulent in law, being made without any present consideration being paid therefor.

Fourth. That the court erred in this, that it should have required the bank to satisfy its debt pro rata from the proceeds of the Darling note, and the proceeds of the debenture bonds, and should not have required the bank to make full payment of the proceeds of the Darling note upon its claim, paying the balance only from the proceeds of the debenture bonds.

The first two propositions of appellant can be treated together. These bonds were assigned by Davis to the bank garnishee as collateral security only for the amount due from

<p>1. GARNISHMENT: rights ac- quired: defend- ant in execu- tion parting with interest: corporate bonds.</p>	<p>Davis to the bank. Upon the payment by Davis of his debt to the bank, Davis would be entitled to the bonds, and, upon such payment and a failure to deliver, could have maintained an action against the bank to re-</p>
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cover the possession of the bonds. The ownership of the bonds

in Davis invested him with a right to maintain an action against the Iowa Loan & Trust Company upon the bonds in the event the bonds were not paid by this Trust Company when due. The transfer of these bonds to the garnishee bank invested them with the same rights that Davis had for the collection of them, to wit, a right to collect and appropriate the proceeds to the payment of the note to which the bonds were collateral. The right to the proceeds of these bonds was, at all times, in the owner of the bonds. Like a promissory note, they were in themselves property. When Davis transferred these bonds to the bank as collateral, the law implied an obligation, from the very relationship created, to return these bonds to Davis whenever the debt to which they were collateral was paid, and a legal obligation to return to Davis any portion of the proceeds of the bonds which remained after satisfying the debt to which they were collateral. When Davis assigned to King these bonds, the assignment carried with it the right to maintain an action against the bank for the possession of the bonds upon the payment of the debt to which they were collateral, and a right to maintain an action against the bank to recover the proceeds of the bonds remaining, if any, after the satisfaction of the debt to which they were collateral.

The assignment of the bonds to King carried with it not only the bonds, but all rights of Davis in and to the bonds and their proceeds. This assignment was made before the garnishment was served. Under the garnishment, the plaintiff acquired only such rights in the property as defendant Davis had at the time of the service of the garnishment, and no other. Davis having assigned the bonds to King, subject only to the rights of the bank to hold the same as collateral, there was nothing to which the garnishment could attach. As bearing upon this question, see *McGuire v. Pitts' Sons*, 42 Iowa 535; *Kerr v. Kennedy*, 119 Iowa 239; *Harlow v. Bartlett*, 52 Atl. (Me.) 638; *Ives v. Addison*, 17 Pac. (Kans.) 797; *Handley v. Pfister*, 39 Cal. 283.

The plaintiff and King were both creditors of Davis. King had a right to protect himself and to receive payment in money or property from Davis, although the effect of it might be to prevent other creditors from securing their claims. There is no evidence of any fraudulent intent on the part of King in taking assignment of these bonds. In fact, no purpose is evidenced except the honest purpose to secure the payment of his own claim against Davis. This he secured by taking an assignment of the bonds. When Davis assigned the bonds to King, they became his property, subject only to the right of the bank to hold the same as collateral security. The assignment of the bonds carried with it the right to the proceeds of the bonds, whether collected by the bank or by King, as against Davis. By the assignment, Davis parted not only with the bonds themselves, subject to the bank's right, but to the proceeds of the bonds subject only to the same right. After the notice of the assignment had been served on the bank, it was legally bound to return the bonds to King in the event the indebtedness for which they were collateral was paid, and in the event the bonds were collected by the bank and a balance of the proceeds remained after satisfying the debt to which they were collateral, they could not have paid this balance to Davis without being liable to King therefor.

The bank had nothing, then, in these bonds at the time of the garnishment except a right to apply the same, or their proceeds, to the payment of the debt to which they were collateral, and, therefore, plaintiff reached nothing in the hands of the bank by the garnishment proceeding.

The contention of the plaintiff was that this collateral property in the hands of the bank, or its proceeds, belonged to the defendant, Davis, subject only to the right to appropriate it to the payment of the debts to which it was collateral. By the assignment of these bonds, Davis parted with all that the plaintiff sought to reach by his garnishment. The plaintiff is placed in the position of claiming that, so far as the

garnishment is concerned, the collateral belonged to Davis, subject only to the rights of the bank to appropriate it to the payment of the debts to which it was collateral. If this be true, then the assignment by Davis to King placed King in the same position that Davis would have been in, had no assignment been made. It cannot be said that these bonds assigned to the bank as collateral security belong to Davis for the purpose of attachment, but did not belong to Davis for the purpose of assignment. Whatever rights the plaintiff acquired by his attachment must be worked out through Davis. If Davis had no right to these bonds, or the proceeds, at the time of the attachment, then the plaintiff acquired none by the garnishment.

The next contention of the appellant is that the assignment was fraudulent in law, being made without any present consideration paid therefor. The record discloses that

2. FRAUDULENT
CONVEYANCES:
conveyances:
when vulner-
able to attack. Davis was indebted to King; that he assigned these bonds to King in satisfaction of that debt; that it was a bona fide debt. That the transfer was made in good faith, so far as King was concerned, there can be no question. King accepted the assignment of these bonds in payment of the debt due from Davis and canceled the debt. This was a good consideration, and, in the absence of any proof of a fraudulent purpose in the transfer, it cannot be attacked on this ground. This is elementary.

The last contention of the plaintiff is that the court erred in requiring the garnishee bank to apply the amount received from Darlings in payment of the debt due from

3. GARNISH-
MENT: order
not affecting
plaintiff in
execution:
futility of
objection. Davis to the bank, and in requiring that the bonds, or their proceeds, be used only to satisfy any deficiency arising therefrom. This the garnishee could have done without an order of the court, and the plaintiff could not have complained. Of this, King could not complain and does

not complain. We do not think plaintiff is in a position in a proceeding of this kind to insist upon a marshalling of assets.

We find no error in the record, and the cause is—*Affirmed.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

EGGERT & LOCKWOOD, Appellees, v. INTERSTATE INVESTMENT
& DEVELOPMENT COMPANY, Appellant.

APPEAL AND ERROR: Abstracts—Rule for Preparation—Violation—Penalty. “Preserve everything reasonably material and omit everything else” is an ancient rule for the preparation of abstracts. An affirmance may follow a glaring violation of this rule, especially when the cause has been three times tried and the rulings appear correct. (Rule 31, Supreme Court, and Sec. 4118, Code. 1897.)

PRINCIPLE APPLIED: In a cause with comparatively simple issues, followed by a verdict for \$175, the abstract revealed: Pleadings with exhibits, 303 pages; opening statement, on which no point was raised, 52 pages; evidence, instructions and motions, 316 pages; total 671 pages. Questions and answers were largely copied. A vast mass of correspondence, resolutions, etc., not material to an understanding of the appeal, were inserted. Cause had pended seven years. Three trials. The rulings appeared correct. *Affirmed.*

Appeal from Floyd District Court.—HON. C. H. KELLEY,
Judge.

THURSDAY, JUNE 24, 1915.

ACTION to recover for services alleged to have been rendered the defendant by plaintiffs as attorneys at law, alleged to have been of the value of \$2,090.11. There was a verdict and judgment for \$174.74 with interest from April 3, 1908. The defendant appeals.—*Affirmed.*

H. J. Fitzgerald, C. D. Ellis, Yoran & Yoran, for ap-
pellant.

Eggert & Lockwood and J. C. Campbell, for appellees.

PER CURIAM: The original petition was filed July 20, 1908, alleging that plaintiffs had rendered to the defendant services as attorneys at law of the reasonable value of \$2,090.11. The court instructed the jury that items amounting to \$600.35 might not be recovered, and submitted liability for the balance to the jury under issues raised by the pleadings. The main defense interposed was that plaintiffs had been employed by another company whose interests were antagonistic to those of the defendant concerning the matters for which plaintiffs claimed compensation, and therefore that they were not entitled to compensation from the defendant; and farther, that some of the alleged services were rendered certain directors in executing their purposes contrary to law and in known hostility to the interests of the defendant, and also that one of the members of the plaintiff firm, when rendering the alleged services, was a director of defendant and engaged in illegally diverting the property of the defendant. By way of counterclaim, defendant alleged that advice was given by the plaintiffs in ignorance of the law, and that they were guilty of negligence in the discharge of their duties as

1. APPEAL AND
ERROR: ab-
stracts: rule
for prepara-
tion: viola-
tion: penalty.

attorneys at law, to defendant's damage in the sum of \$5,000, and that defendants had paid them \$844.26 for alleged services, to which they were not entitled. An examination of the record leaves no doubt that the issues were clearly and fairly submitted by the instructions, and that, as bearing on these, the evidence was in conflict. The cause then was rightfully submitted to the jury. As the abstract filed was not such as was exacted by the rules, the several points raised will not be discussed in detail. The time which might have been given to that has been devoted to examining an unnecessarily prolix abstract. Appellant seems to have wholly ignored the rules of this court in the preparation of the abstract. It should have contained only so much of the record as was necessary to a full understanding of the questions presented for decision. Though the claim was for a little

over \$2,000 as compensation for services as attorneys, a counterclaim not seriously pressed, and the verdict but \$174.74, we have an abstract of 676 pages. The pleadings with exhibits attached cover 303 printed pages; the opening statements on which no point is raised cover 52 pages. The evidence, instructions and motions are condensed into 316 pages. The questions and answers are set out in a large portion of the abstract. Where this is not done, apparently the answers are copied. To the answer were attached copies of correspondence, resolutions and about everything that might have any connection with the organization, management or operation of the two companies. It is hardly conceivable how the rules regarding the preparation of an abstract could be more completely disregarded. It was only necessary to set out enough of the pleadings to enable this court to fairly understand the issues raised. It was only necessary to set out so much of the evidence as was necessary to show the rulings of the court and to enable it to pass upon the issue as to whether the plaintiffs' employment for the Radio Company was inconsistent with that for the defendant, or such services were rendered for the officers of defendant instead of defendant. Sec. 4118 of the Code exacts that "Printed abstracts of the record shall be filed in accordance with rules established by the supreme court." Sec. 31 of the rules of this court provides that "If it appear from an inspection of the abstract that the appellant has negligently or intentionally failed to comply with the rule requiring only so much of the record as may be necessary to a full understanding of the question presented for decision to be included therein, the court may, in its discretion, order a new abstract prepared in conformity with such rule or affirm the judgment of the lower court without considering the appeal." This rule is scarcely subject to misinterpretation. "Preserve everything material to the question to be decided and omit everything else" has long obtained as the rule in this court; and though sometimes we have ordered the substitution of a proper abstract, this has

never been done when satisfied with the rulings of the trial court. In that event, the judgment has uniformly been affirmed rather than to follow the other course specified. *Phillips v. Crips*, 108 Iowa 605; *Cressey v. Lockner*, 109 Iowa 454; *Andrew v. Andrew*, 114 Iowa 524; *Hurley v. Hurley*, 117 Iowa 621.

We are the more inclined to affirm rather than order an abstract in conformity to the rules because of the long pendency of this cause and the fact that this is the third trial, the jurors uniformly returning a verdict for the plaintiffs.—*Affirmed.*

DEEMER, C. J., LADD, GAYNOR and SALINGER, JJ., concur.

FIRST NATIONAL BANK OF SHENANDOAH, IOWA, Appellant, v.
FLOYD COOK, Appellee.

SALES: Fraud—Rescission—Return of Property—Necessity for.

- 1 Failure of a vendee to return or to offer to return property received under a contract induced by false and fraudulent representations is fatal to a rescission of the contract, unless the vendee shows the property is worthless.

SALES: Delivery—What Constitutes—Intention of Parties. “De-

- 2 livery” is an all-important question in those cases wherein the vendee of property of value, in defense of an action for the price, pleads (a) fraud, and (b) rescission, and plaintiff counters with a plea of (a) delivery of the property and (b) retention by vendee. A delivery is any act, in keeping with the intention of the parties, by which the vendor loses and the vendee acquires control of the property.

PRINCIPLE APPLIED: Defendant pleaded (a) that he had been induced to enter into the contract in question by fraud and (b) had rescinded by refusing to receive the property. Plaintiff countered by pleading (a) that defendant did receive the property and (b) retained it. There was evidence that after defendant had first refused to receive the property negotiations were had; that defendant was requested to go to the depot and get the property; that he said he was not able to go at that time; that the vendor offered at his own cost to store the property for plaintiff; that defendant agreed to this and the property was

so stored and defendant notified accordingly; that as a part of the controversy the vendor, at the request of defendant, gave defendant a statement of guaranty as to the property and extended payment one year. *Held* to demand the submission of the question of "delivery" to the jury.

TRIAL: Issues—Duty to Submit—Rule—Sales—Delivery. If there
3 is evidence tending to sustain a material issue, such issue must be submitted to the jury.

PRINCIPLE APPLIED: (See No. 2.)

Appeal from Page District Court.—HON. THOMAS ARTHUR,
Judge.

THURSDAY, JUNE 24, 1915.

ACTION on a written order for the purchase of goods. Defense that the goods were not as represented; that before receiving the goods the defendant discovered this fact and notified the seller that he rescinded the contract of purchase, and that he refused to receive the goods. Judgment for the defendant. Plaintiff appeals.—*Reversed.*

Earl R. Ferguson and C. R. Barnes, for appellant.

Denver L. Wilson and Thos. W. Keenan, for appellee.

GAYNOR, J.—Plaintiff's action is founded upon the following instrument, which was duly endorsed and assigned by the Veterinary Remedy Company to the plaintiff as security for money loaned, to wit:

"Original. Post Office, Harding, So. Dak., May 7, 1900.

"I, F. C. Cook, do hereby purchase of the Veterinary Remedy Company the following described goods: 300 lbs. Lysol Cyclone Worm Powder, 8 cts. per pound; 1250 gallons Lysol Dip, 65 cts. per gallon. Lysol Dipping Tanks — per tank. F. o. b. destination. Total amount \$836.50. I further agree to pay for the same on or before Nov. 1, 1909, at Shenandoah, Iowa.

"J. R. Curran, Salesman.

"Floyd Cook (Name of Purchaser.)"

The defense interposed is:

First. That prior to the execution of this instrument and as an inducement to the defendant to sign and execute it, the Veterinary Remedy Company, through its properly authorized agents, represented and stated to the defendant that the Lysol Dip, mentioned in the order, had been approved by the government at Washington and by the state of South Dakota for the treatment of cattle and sheep for scab, and would answer the requirements of state and federal inspectors in dipping sheep and cattle that had been exposed to or affected by scab, and would meet such requirements under the quarantine law, and that cattle dipped in said dip could be trailed, or moved in and out of the state, as freely as any other stock dipped in any other dip used in the state; that at the time of the making of said order, and for some time thereafter, the western half of South Dakota, including Belle Fourche and vicinity, was affected with a disease or plague called scabies; that stock in that locality ran and mixed together to a great extent upon open ranges; that there was a federal quarantine on sheep and cattle which was then being enforced by the state and by federal inspectors, and by reason thereof, and the regulations of the Department of Agriculture and the rules and regulations of the South Dakota sanitary board, which were also being enforced, owners of cattle were not permitted to drive, trail or transport live stock from one range to another, or into or out of quarantine territory, or across the state line, until they had been dipped in dip approved by the Bureau of Animal Industry at Washington, and its use permitted by the board; that the representations made by the Veterinary Remedy Company to the defendant aforesaid touching the dip named in the order were untrue, and were by the said company known to be untrue at the time they were made; that the defendant believed them to be true and was induced thereby to sign the order; that by reason of the existence and enforcement of the quarantine

false, yet the defendant, after the purchase, and after he had full knowledge of said representations, entered into an agreement of settlement with the Veterinary Company as to any and all disagreements between them with reference to said purchase, and especially waived all claims he might have had with reference to said goods, or with reference to any fraudulent representations, in consideration that the Veterinary Company deliver the goods to him at a certain place at Belle Fourche, and store the same for him; that the Veterinary Remedy Company thereupon, and in compliance with said compromise and settlement, and in consideration thereof, did deliver the goods and merchandise to the defendant at the place designated, and stored the same for him.

Fifth. The plaintiff says that after the goods had been sold and purchased by the defendant, and in pursuance thereof, the Veterinary Remedy Company delivered the same to the defendant at Belle Fourche; that the defendant received the goods and kept the same and they are the property of the defendant and still remain his property; that the same has never at any time been returned or tendered back to the Veterinary Company, but retained by the defendant as his property.

Such were the issues presented by the parties in the pleadings at the time the cause was submitted to the jury by the court. The court held the order divisible, and instructed the jury to return a verdict for the plaintiff for the worm powder, but submitted to the jury for their determination whether or not the defendant was shown to be liable for the Lysol Dip. The jury returned a verdict for the plaintiff for \$30.25, the amount due for the worm powder, with interest, but denied plaintiff's right to recover for the dip, and judgment was rendered in favor of the plaintiff for \$30.25, and all costs were taxed to the plaintiff. From this judgment, the plaintiff appeals.

The court, in submitting the case, told the jury that

1. SALES: fraud:
rescission: re-
turn of prop-
erty: neces-
sity for.

the plaintiff was entitled to recover the full amount of the contract, unless the defense pleaded by the defendant, based upon false and fraudulent representations claimed to have been made by the Veterinary Company, is made out, and then stated correctly what the defendant was required to prove in order to establish this defense and defeat plaintiff's claim. This was practically the only defense submitted by the court to the jury. Then the court told the jury that the plaintiff in its reply pleaded in avoidance of such defense. First, a general denial; second, that the representations made as alleged were not untrue, but were in fact true. The court then said to the jury:

“Some matters are pleaded by both the plaintiff and the defendant which are not set forth in the issues herewith submitted to you for the reason that, in the judgment of the court, such matters have not sufficient support in the evidence or in the law.”

The court thus practically withdrew from the consideration of the jury the claim of the plaintiff made in the fourth and fifth counts of its reply, in which it sought to avoid the effect of the defense if proven. The court, in substance, said to the jury that to make out his defense, the defendant must show the following facts: First, that the Veterinary Company made the representations charged to have been made; second, that these representations were false; third, that they were made to induce the defendant to purchase the dip; fourth, that the defendant believed them to be true, and was induced by them to purchase the dip, and said, “If the defendant has established the above matters, the defense is made out as to the dip; otherwise, not.”

The court limited the plaintiff's reply to a denial that it made the representations, and to an affirmative allegation that if they were made, as stated, they were true at the time they were made.

The defendant pleaded affirmatively that the goods were never received or accepted by him. The plaintiff tendered an amendment to its petition, alleging affirmatively that the goods were delivered, received, accepted and retained by the defendant. This amendment was refused. Nowhere did the court indicate to the jury where the burden rested to show the truth of this allegation, that the goods were or were not delivered to the defendant. In view of the position taken by the defendant in his answer, this was an important inquiry, the truth of which went to the meat of the defense. The court nowhere told the jury what the effect would be upon the legal rights of the parties if it should appear that the Veterinary Company had delivered the goods to the defendant; that he had received and retained the same, and they were of some value. Nowhere did the court tell the jury that, if they found from the evidence that the Veterinary Company had delivered the goods to the defendant, that he had accepted and retained the same and that they were of some value, he could not rescind and thereby defeat recovery without a showing that he had returned or offered to return the goods so received. This issue was squarely tendered by the plaintiff in its reply. There was some evidence tending to support it. The court should have submitted it to the jury.

It is elementary that where one enters into a contract with another, based upon representations or warranties as to the character or nature of the thing to be delivered, and he subsequently discovers that the thing is not as warranted or represented, yet has some value, he must, if he desires to rescind, return or offer to return the thing received. He may, however, retain the thing and sue and recover the difference between the actual value of the thing received, under such circumstances, and what its value would have been if it had been as represented or warranted; or he may, if sued for the purchase price, counterclaim, and the measure of his recovery upon such counterclaim would be the difference between the value of the thing received and retained by him,

as it was at the time it was received, and in the condition in which it was received, and what it would have been worth had it been as represented or warranted.

It will be noticed by referring to the defendant's answer that he nowhere pleads that the dip was of no value. His plea is that it was of no value to him; was not salable in South Dakota; was valueless in South Dakota because of conditions existing there. There is no proof that this dip was of no value. The most that can be claimed for the proof is that it was not salable in South Dakota, by reason of existing conditions, and for the purposes for which the plaintiff bought it.

It would follow, therefore, that if this dip was of some value, and it had been delivered to and received by the defendant, he should have returned or offered to return it as a condition precedent to his right to rescind. It may have been of no value to the defendant. It may not have been salable in South Dakota, and yet to the Veterinary Company it may have been of its full contractual value. The jury were not permitted to pass upon this question under the instructions given by the court. Of course, if it had been of no value at all to anyone, no obligation would have rested on the purchaser to return it, or offer to return it.

To justify a rescission which would relieve from the obligation to pay for the thing purchased, it must be shown not only that the thing purchased was not as warranted or as represented, but that the party receiving the goods returned or offered to return them to the party from whom they were received, or that they were in fact of no value at all. We do not presume to pass upon the sufficiency of the evidence to sustain these allegations of the reply, but we do say that there was some evidence from which the jury might find that the goods were actually delivered to and received by the defendant; that they were of some value, and that the defendant had failed to return or offer to return the goods before

attempting a final rescission. On this point see *Wurlitzer Co. v. Rhea*, 147 Iowa 382; *Rose v. Eggers*, 148 Iowa 306.

Whether or not there is a delivery of goods, whether goods are delivered and accepted by a party, is often a question of the intention of the parties at the time. They may

2. **SALES: delivery: what constitutes: intention of parties.** agree upon any method of delivery, either as to manner, time, or place of delivery. Delivery involves a parting with the control of

the property to the one to whom the delivery is made, or the placing of the goods, with the consent and knowledge of the purchaser, in such a position that they are unconditionally at the disposal of the purchaser. On this point, see *Petroleum Products Co. v. Alton Tank Line*, 165 Iowa 398; *Hamilton v. Brewing Co.*, 129 Iowa 172; *Leggett & Meyer Tobacco Co. v. Collier et al.*, 89 Iowa 144. We think the court erred in not submitting to the jury these issues tendered by the plaintiff in its reply. There was some evidence to support them.

It is the duty of the court to submit to the jury on its own motion the issues presented whenever there is evidence tending to sustain the same. It is not for the court to weigh

3. **TRIAL: issues: duty to submit: rule: sales: delivery.** the evidence and sit in judgment upon the credibility of the witnesses. The rule is: If there is evidence tending to sustain an issue

material to the proper determination of the rights of the parties, under the issues made, the court must submit the issue to the jury for its determination; for they are the judges of the credibility of the witnesses and the weight to be given to their testimony. On this point, see *Faust v. Hosford*, 119 Iowa 97; *Overhouser v. American Cereal Co.*, 128 Iowa 580.

• With the record showing a dispute in the evidence as to whether or not the dip was delivered to and accepted by the defendant, the court not only erred, but in its twelfth instruction emphasized its error in not submitting, as a question of fact, whether or not there was, in fact, a delivery and acceptance by the defendant.

In its twelfth instruction, the court practically told the jury that a rescission might be made without returning or offering to return the dip, even though it had some value. This twelfth instruction reads as follows:

“If it appears from the evidence that the defendant was induced through the false and fraudulent representations of the Veterinary Remedy Company, through its agent, J. R. Curran, to purchase the Lysol Dip, as before explained, this would justify the defendant in rescinding the contract of purchase of said Lysol Dip, and such rescission, under such circumstances, would defeat the plaintiff's recovery on the order in question, so far as the item of Lysol Dip is concerned, provided such rescission, if he did make a rescission, was made within a reasonable time after he discovered that the representations made to him, if they were made, were false, *by notifying the Veterinary Remedy Company, or its agent, J. R. Curran, that he would not receive the Lysol Dip*, and whether such rescission, if you find there was a rescission of the contract, was made within a reasonable time, is a question of fact for you to determine from the evidence bearing thereon.”

The jury in this instruction were told that the defendant could rescind the contract by notifying the Veterinary Company that he would not receive the dip, and that this rescission would be effectual in defeating plaintiff's recovery. In this instruction, there was no limitation upon the right to rescind, if the dip was not found to be as represented, except that the notice of rescission must be given within a reasonable time.

The jury were nowhere told in the instruction that if the dip had been delivered to the defendant and was of some value, he could not rescind by simply giving notice of his purpose to rescind within a reasonable time; that something more would then be required to make a rescission effectual, to wit, that he must have returned or offered to return the thing received.

The court must have assumed that the dip had never been delivered to the defendant; that he had never received or accepted it; that it was still in the possession of the Veterinary Company. With this assumption, the instruction would be undoubtedly correct, but with the fact as to delivery being in dispute, there remained this further question to be determined by the jury as a condition precedent to the right to rescind.

Defendant claims that within two days after the giving of the order sued on, he notified the agent of the company, and subsequently the company, that he would not receive the dip; that he had discovered that the representations made were not true. If this were the whole record, and it appeared that he refused to receive the dip when it was shipped, such rescission would be a complete defense to plaintiff's right to recover. But it appears that after this attempted rescission, there subsequently were further negotiations between the parties, touching the matter of this contract, and further discussion touching the dip and the representations made, and that he was told that it had not passed government inspection, but was in process and would pass; that written samples had been submitted to the government; that he was notified that the dip was at Belle Fourche, and he was requested to come and receive it; that he said he was not able to go to Belle Fourche at that time; that he was busy, and some arrangement was made for the storing of the dip for him. At least, this is plaintiff's contention; that the company's agents told him that they would store it for him until such time as he could get off and go down and get the dip; that he assented to this; that they did store the dip. It is claimed by the plaintiff that this was done as an accommodation to the defendant, and that, as a further accommodation, they agreed to pay the storage at the place where it was agreed to be stored; that he was subsequently informed as to where it was stored.

It further appears that on the 9th day of May the defendant had a talk with Curran, the agent who took the contract, in which talk this dip was discussed. Defendant claimed it was not as represented. Curran claimed that it was as represented; that the defendant asked that he give him a statement as a guarantee of the dip he was to receive; that thereupon Curran wrote out a statement and delivered it to the defendant who, after having read it, retained it. The statement delivered was in the following words:

“Veterinary Remedy Company, Manufacturers of the Celebrated Lysol Dip, Greatest of all Disinfectants and Lice Killer.

“Shenandoah, Iowa, May 9, 1909.

“This is to say that the Veterinary Remedy Company of Shenandoah, Iowa, will extend Mr. F. C. Cook’s obligation one year from November 1, 1909, should dip be on his hands at said date. Dip is to pass government approval.

“J. R. Curran.

“Regular dray or freight from depot to Cook’s ranch to be allowed on all goods shipped to him.”

Of course, there is a dispute between the witnesses as to this written instrument, as to why it was made and delivered to the defendant; but in this dispute, there is a controversy, and the jury’s province was to settle this controversy. The theory of neither party can be accepted by the court as a correct interpretation of what actually happened between the parties at the time.

There are other complaints made by appellant of which we do not now take notice for the reason that the case must be reversed for the errors hereinbefore referred to. The matters of which complaint is made are of such a character that they are not likely to occur upon a re-trial of the cause. Some of them cannot occur upon a re-trial of the cause. Others are of such a character that they will not be controlling upon such trial.

For the errors pointed out, the case must be and is—
Reversed.

DEEMER, C. J., LADD, PRESTON and SALINGER, JJ., concur.

LAZ W. NIBECK, Appellant, v. JOHN REIDY, Appellee.

JUDGMENTS AND DECREES: Service of Original Notice—Valid-
1 **ity.** Service of original notice is jurisdictional. *Held*, no legal service was made on the wife of one of the defendants. (Sec. 3518, Code, 1897.)

PRINCIPLE APPLIED: A return recited the fact of service on a wife by leaving a copy with her husband at her usual place of residence in a county named, without farther description as to the location of the house. The return was false. The notice was in truth handed to the husband while he was in a town some distance from the farm where the wife resided. *Held*, the attempted service gave the court no jurisdiction.

JUDGMENTS AND DECREES: Void Judgment—Action to Annul—
2 **Laches—Estoppel.** A judgment, void because of lack of jurisdiction, may be set aside and formally annulled, even though the action to set aside is delayed until such a time that the statute of limitation has fully run on the indebtedness on which the judgment was based, no bad motive appearing to have actuated such delay, and the plaintiff in the action to set aside being under no obligation to speak.

PRINCIPLE APPLIED: A husband and wife gave one Reidy three notes, due January 1, 1902, 1903 and 1904, respectively, on which judgment was rendered in December, 1911. No service was had on the wife. For some time prior to this last date, the wife supposed the husband had paid the notes. She first learned to the contrary in August, 1913, when her husband told her that judgment had been rendered against her on the amount due Reidy. She delayed action to set aside the judgment until January, 1914, at which time the statute of limitation had fully run on all the notes. She did not pay or offer to pay Reidy the amount due on the notes. "There was no evidence that she knew or ought to have known when the notes matured or when they would be barred by the statute of limitation." She explained her delay in bringing action by showing that she lived on a farm some distance from the county seat, that they were late in

getting their corn picked and that she was in another state a short time in November, 1913. *Held*, no such delay or conduct as worked an estoppel to set aside the void judgment.

JUDGMENTS AND DECREES: Void Judgment—Condition to Annulment—Payment of Original Claim—Good Defense. A void judgment may be set aside and formally annulled without payment or offer to pay the original bona fide claim on which the void judgment is based, when such original claim is barred by the statute of limitation.

PRINCIPLE APPLIED: (See No. 2.)

Appeal from Buchanan District Court.—HON. G. A. DUNHAM, Judge.

THURSDAY, JUNE 24, 1915.

ACTION in equity to cancel a judgment on the ground that it is void because there was no service of the original notice upon the plaintiff. Decree for the defendant in the court below. Plaintiff appeals.—*Reversed*.

Cook & Cook, for appellant.

M. A. Smith, for appellee.

GAYNOR, J.—This is an action in equity to set aside a judgment claimed to have been entered without notice to the plaintiff of its pendency. It appears that on and prior to the 23d day of December, 1911, the plaintiff and her husband were indebted to the defendant Reidy on three promissory notes, as follows: One note for \$100, due January 1, 1902; one note for \$100, due January 1, 1903; one note for \$175, due January 1, 1904. On the 23d day of May, 1911, Reidy brought suit against this plaintiff and her husband upon the notes. A judgment was entered against them both for \$375 with costs. The return of the original notice in that suit showed personal service on the husband and, as to this plaintiff, recited that it was served by leaving a true copy at her house, the same being her usual place of residence, with her

husband, C. H. Nibeck, a member of her family, with whom she resided, and who was over fourteen years of age, she not being found in the county. The fact as to the service on this plain-

tiff is as follows: The deputy sheriff found
1. JUDGMENTS
AND DECREES:
service of orig-
inal notice:
validity. C. H. Nibeck, the husband, in the town of Stanley, and served the notice personally upon him there. He asked the husband where his wife was and was told that she was at home. The deputy then said, "I will drive out and serve the notice on her." The husband said, "My wife is not well. Give me the notice. I will give it to her." The deputy said, "That would be no service. I would have to serve it on her personally, or it wouldn't be good." The husband said, "I would rather you wouldn't." The deputy said, "I will serve then on you," and he read the notice to the husband and gave him a copy for his wife.

This was all the service of the notice upon her. She had no notice or knowledge of the pendency of the action. She did not know there was then any existing indebtedness against either her or her husband in favor of this defendant. She knew that at one time they were indebted to the defendant, but she supposed that it had been settled by her husband. She did not learn of the existence of the judgment until August, 1913. She then learned that the judgment had been entered against her in favor of this defendant, Reidy. At the time this judgment was entered, she did not appear, nor did anyone appear who was authorized to represent her in the cause. This suit to set aside the judgment was commenced in January, 1914. The notes were then barred by the statute of limitations.

At the time the notice was served on this plaintiff in the original suit, she was residing on a farm with her husband some distance from the town of Stanley, and in a different township. There was, therefore, no legal service on the plaintiff of the pendency of this action, giving the court jurisdic-

tion of her person, and the judgment, therefore, as to her, was absolutely void for want of jurisdiction.

The plaintiff is met, in this case, with two defenses:

First. That, at all times since the bringing of the action that resulted in the judgment which is involved here, the plaintiff was informed of the same, and knew of the rendition of the judgment at the time; that she was represented by counsel, who stated in open court that they had been consulted about the case, and asked time to see further whether or not this plaintiff desired to defend the action; that these attorneys afterwards said that there was no objection, and judgment might be entered.

This defense fails upon the facts. There is no evidence that plaintiff authorized anyone to appear for her, or that these attorneys did, in fact, appear for her; that they had any authority to represent her in the cause, and there is no evidence that she knew of the pendency of the action, or of the rendition of the judgment until August, 1913.

Second. That the cause or action against the plaintiff, on which the judgment was obtained, is now barred by the statute of limitations, and that the plaintiff, although at all times knowing that the judgment was in existence, and knowing that it was obtained on a valid and existing obligation, has delayed the bringing of this action until this late date in order to cheat and defraud the defendant herein, and for that purpose only.

As to this defense, the only substantive fact alleged which the evidence shows to be true is the fact that the notes are now barred by the statute of limitations.

Upon the hearing in the district court, judgment was entered for the defendant, dismissing plaintiff's petition, and from this judgment plaintiff appeals.

This case, under the record made, may be determined on two propositions:

2. JUDGMENTS

AND DECREES:

void judgment:

action to an-

nul: laches:

estoppel.

existence, and knowing that it was obtained on a valid and existing obligation, has delayed the bringing of this action until this

1. Is the plaintiff guilty of laches in not commencing her action to set aside the judgment sooner than she did?

2. Can the plaintiff have the judgment, though void, set aside without first paying, or offering to pay, the amount due on the claims upon which the judgment was entered?

Much of the evidence in this case is confined to an exposé of what the husband knew and did and thought and intended. Much of it is devoted to showing a secret purpose on the part of the husband to delay the bringing of the action until after the notes were barred by the statute of limitations. There is no evidence that the wife knew of the existence of the indebtedness, or that a judgment had been entered against her, until August, 1913. The evidence discloses that she had supposed that her husband had adjusted the indebtedness, and that it no longer existed, and that she did not learn that it had not been adjusted, and that it did exist, until she was informed by her husband in August, 1913, that a judgment had been entered against her upon the indebtedness due Reidy. During all this time, she did nothing to mislead the defendant, or to lull him into a belief that the judgment was binding upon her. The only delay that can be charged against her is found in the time intervening between August, 1913, and January, 1914. There is no evidence that she knew when these notes matured, or when they would be barred by the statute of limitations, or that she had any purpose or intent in delaying the bringing of this suit to secure the advantages of the bar. The judgment was void and she need have done nothing but wait until the defendant attempted to enforce it, and then invoke the rights she herein seeks to have recognized. She owed the defendant no duty to inform him that his judgment was void, and that the notes would be barred in January, 1914.

In determining whether or not the plaintiff was guilty of laches in not commencing this action earlier, we must look to the record. The plaintiff is a woman, the wife of a farmer; lived with him on a farm some distance from the county seat. She did not learn of the existence of this judgment until the

last of August. Her explanation, and the only explanation given of the delay, is as follows:

Q. "How did you happen to find out about this?" A. "There was a party spoke to me about buying my place. When my husband got home, I spoke to him about it. He said, 'We can't sell it.' I said, 'Why?' He said, 'There was a judgment against it.' I asked him who had one. He said, 'Reidy.' I asked him how it came. I told him I supposed Reidy's bill was paid. I knew at one time we owed Reidy, and I supposed it was paid because they had served papers at one time on us, and shortly after that, my husband went to Winthrop, and I supposed he had settled it. That is what he said he was going to do, and when he came back, he said he had drawn up a contract to bale hay for him, and shortly after that, I can't say how many weeks, maybe a couple of weeks, he took his press and went down there and baled hay, and when he got back, I supposed it was paid. I heard of this judgment the last of August, 1913. I waited until I could have a convenient time and then came down to see my attorney. This was in January, 1914. We did not get our corn out until pretty late. I was in Dakota a short time during November."

We do not think the record discloses unreasonable delay, under the circumstances, in bringing the action. The record does not disclose that she was influenced by any improper considerations in delaying the action. It does not show that she knew, or had reason to believe, that the delay would affect, in any way, the defendant's right. The only basis for an inference of wrongful purpose in the delay is the fact that the notes were barred before the action was brought; but, in the absence of any showing that she knew when the notes matured, or when they would be barred by the statute of limitations, no improper motive can be inferred by the delay.

Much of the argument proceeds upon the theory that this plaintiff knew that a judgment had been entered against her

upon a valid claim; that she had secret knowledge that the judgment, although regular upon its face, was in reality void, and purposely waited until the statute of limitations had run against the original claim, before she commenced her action to have the judgment set aside. The argument is that, under these circumstances, she cannot have it set aside without having some defense to the original claim or offering to do equity by satisfying the claim upon which the judgment was entered.

This contention is not supported by the record. There is no evidence of a secret knowledge of the existence of the judgment, or that it was regular or irregular upon its face. There is no evidence that she, from improper motives, or for the purpose of securing undue advantage, delayed the bringing of this action. There is no evidence that she knew, or had reason to believe, or should have known, that the statute of limitations would run against the original claim if the action were delayed until January, or that it had run at the time the action was commenced.

Reliance is had upon what this court has said in *Parsons v. Nutting*, 45 Iowa 404; *Byers v. O'Dell*, 56 Iowa 618, and other cases.

The plaintiff has a good defense against these notes. They are barred by the statute of limitations. She did nothing to lull the defendant into the belief that the judgment

<p>8. JUDGMENTS AND DECREES: void judgment: condition to annulment: payment of original claim: good defense.</p>	<p>against her was valid. She is not compelled to pay a claim that cannot be enforced against her, as a condition precedent to having this void judgment against her set aside.</p>
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As supporting our conclusions, see *Shehan v. Stuart*, 117 Iowa 207-211; *Jamison v. Weaver*, 84 Iowa 611. In this latter case the court said:

“The judgment was rendered on an account for goods sold and delivered in 1871 and 1872, which account has long since been barred by the statute of limitations, and is not

now a valid claim against the appellee. The judgment being void for want of jurisdiction in the court rendering it, and the account not now a valid claim, and subject to a complete defense, the appellee is entitled to have the judgment cancelled."

See also *Worrall v. Chase & Co.*, 144 Iowa 665-670.

We think the court erred in dismissing plaintiff's petition, and the cause is, therefore,—*Reversed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

JOHN ROSENCRANS, Appellant, v. W. WOODBRIDGE, Appellee.

APPEAL AND ERROR: Denial of Abstract—Transcript of Evidence

1 —**Degree of Certainty Required.** A transcript of the evidence must be sufficiently comprehensive to enable the court to say definitely whether the abstracted testimony was before the court when the ruling complained of was made. Self-evident and indefinite omissions of evidence and lack of certainty as to what proceedings were had are here held to render the transcript ineffective.

PRINCIPLE APPLIED: The lower court dismissed plaintiff's claim for damages to a horse. On appeal, plaintiff abstracted certain testimony. Appellee specifically denied that any such testimony existed. Appellant filed a transcript of portions of the evidence of each witness. What was omitted was indefinite. Whether there were motions to strike out or otherwise affecting such evidence was not shown. Whether such evidence as there may have been was not obviated by other evidence adduced on cross-examination was not shown.

APPEAL AND ERROR: Report of Trial—Certification—Require-

2 **ments.** The statute (Sec. 3675, Code 1897) requires both judge and reporter to certify to the report of the proceedings of the trial, and this requirement is not complied with by a certificate signed by one of them asserting that the other has done so.

Appeal from Linn District Court.—HON. W. N. TREICHLER,
Judge.

THURSDAY, JUNE 24, 1915.

ACTION to recover damages alleged to have been suffered by plaintiff from a collision with an automobile, and the value of a horse alleged to have been killed thereby, resulted in a verdict allowing damages for personal injuries, but the withdrawal from the jury of the claim for the value of the horse. Judgment was entered thereon, and the plaintiff appeals.—*Affirmed.*

L. M. Kratz, for appellant.

Voris & Haas, for appellee.

LADD, J.—Appellee denied that there was any testimony in the record, as set out on certain pages of the abstract, being that of plaintiff and his two sons, relating to the injury to and value of the horse. In the absence of such testimony so denied, the ruling of the trial court, in withdrawing the claim for damages to the horse, must be approved. To sustain the abstract, appellant filed a transcript of portions of the evidence, to which was attached the official reporter's certificate that he reported the proceedings in shorthand, "that the shorthand notes so taken upon said trial were duly certified by the judge presiding at said trial and by me as the official reporter, and that they were duly filed with the clerk of such court and made a part of the record of said case. . . . That at the request of counsel for the plaintiff in said cause I transcribed or translated into longhand portions of such shorthand notes taken upon said trial, and that the transcript or translation to which this certificate is attached is a correct and true transcript or translation of such portions of the shorthand notes of said trial so taken by me upon the trial aforesaid."

No other certificate is attached thereto, and we are of the opinion that this is insufficient, for that (1) the proceedings were not so certified to as to constitute a proper bill of exceptions; and (2), even were the certificates sufficient, not

1. APPEAL AND
ERROR: denial
of abstract:
transcript of
evidence:
degree of cer-
tainty re-
quired.

enough of the record is presented to enable the court to say whether the evidence abstracted was before the court at the time of the ruling. The transcript itself discloses the omissions of portions of the evidence of each witness, and there is nothing to indicate how much was omitted, whether there were motions to strike out or otherwise affecting such evidence and rulings thereon, nor the nature of said motions or rulings, or whether such evidence as there may have been was not obviated by other evidence adduced on the cross-examination of the witnesses. This being so, it is impossible to say whether the evidence, such as abstracted, was before the court when the motion to withdraw the claim for the value of the horse was ruled on.

Again, Sec. 3675 of the Code provides that "such report shall be certified by the trial judge and reporter, when demanded by either party, to the effect that it contains a full,

2. **APPEAL AND
ERROR: report
of trial: cer-
tification:
requirements.**

true and complete report of all proceedings had that are required to be kept, and, when so certified, the same shall be filed by the clerk and, with all matters set out or identified therein, shall be a part of the record in such action, and constitute a complete bill of exceptions." There is nothing in the statutes conferring authority upon the reporter to certify to the filing of a record or paper with the clerk, nor is he authorized to certify to the certification by a judge or to the sufficiency of any certificate as that it was "duly certified by the judge presiding at the trial." The statute requires both judge and reporter to certify to the report, and this requirement is not complied with by a certificate signed by one of them and asserting that the other has done so. The usual practice is for the judge to certify to the transcript, and formerly this was held sufficient without the signature of the reporter. *Dietz v. Capital City Brick & Pipe Co.*, 103 Iowa 542. And it is now settled that the transcript is sufficiently certified if the reporter copy therein, and in connection with the translation of his notes, a true and cor-

rect copy of the judge's and reporter's certificate attached to the shorthand notes in the form exacted by Sec. 3675. *Steele Smith Grocery Co. v. Potthast*, 109 Iowa 413; *Fordyce v. Humphrey*, 152 Iowa 76. But the certificate of the trial judge cannot be supplied by the assertion of the reporter that such a certificate is in existence. Had the clerk of the district court certified to the existence of such a certificate, a different question would be presented. In either event, however, it would seem that the certificate or copy thereof should be before the court, to the end that it may determine for itself whether made in compliance with the above cited section, and such as to indicate that the transcript necessarily contains the evidence on the subject under investigation. In view of the denial of the abstract, and the appellant's failure to support the same by a sufficient certification of the record, as exacted by the rules, we necessarily conclude that the record before us is not such as to enable us to review the question presented on this appeal. For this reason, the judgment of the district court must be and it is *Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

VAN VLIET FLETCHER AUTOMOBILE COMPANY, Appellee, v.
C. C. CROWELL, Appellant.

FRAUD: Contract Induced by Fraud—Affirmance—Right to Recover

1 **Damages.** Affirmance of a contract after full knowledge that it was induced by fraud bars the right to rescind, but waives neither the fraud nor right to recover damages. For instance, one fraudulently induced to buy a note secured by mortgage may affirm the contract after learning of the fraud, foreclose the mortgage, and recover the deficit in damages.

FRAUD: Representations as to Value—When Actionable. Repre-

2 **sentations as to value** may constitute actionable fraud when the parties do not have equal opportunity to know the truth, and the one with superior opportunity makes the representations, intending them to be taken as a fact and as an inducement to the sale.

PRINCIPLE APPLIED: Plaintiff bought a fourth mortgage on land situated in a distant part of the state. The land was covered with snow, which fact was in the minds of the parties as preventing an adequate inspection. The evidence justified a finding that the holder of the mortgage stated that he had been over the land; that he knew its character; that it was worth, and that the owner had been offered, \$85 per acre for it; that it was worth \$20,000 over all incumbrances; and that the buyer of the mortgage could rely on such statements of value. The holder of the mortgage did nothing to prevent the purchaser from examining the land. *Held*, finding of actionable fraud was justified.

FRAUD: Scienter—Sufficiency of Evidence to Show. Evidence re-
3 viewed and held sufficient to carry the question of *scienter* to the jury.

FRAUD: Purchase of Secured Note—Fraud—Affirmance—Action for
4 **Damages—Worthlessness of Security—Insolvency of Makers—Necessity of Proof.** He who alleges damages must prove damages. For instance, the victim of a fraudulent contract for the purchase of a promissory note secured by mortgage, who affirms the contract and sues for damages, must show (a) the worthlessness of the security, and (b) the insolvency of the maker of the note.

TRIAL: Argument—Reading Depositions—Discretion of Court.
5 Whether depositions may be read by counsel during argument to the jury, even by way of answer to argument of opposing counsel, is discretionary with the court.

FRAUD: Character of Land—Materiality on Value. The “value”
6 of land being a material issue in an action for false representation as to the value of the land, evidence as to the character of the land was admissible as bearing on value, even though plaintiff had withdrawn his charge of false representation as to the character of the land.

APPEAL AND ERROR: Unproved Claim—Failure to Withdraw—
7 **Verdict in Justifiable Amount.** Oversight in the court in not withdrawing from the jury an unproved claim does not constitute error when the amount of the verdict has full support in the evidence.

FRAUD: Sale of Real Estate Junior Mortgage Security—Damages—
8 **Value “When Redemption Expires.”** In actions for damages for fraud in the sale of land, the material inquiry is the value of the

land "at the time of the sale." If, however, the action is for damages for fraud in the sale of a note secured by a *junior mortgage on land*, the material inquiry is the value of the land "at the time redemption from senior mortgage could be made," the parties clearly contemplating such redemption.

Appeal from Polk District Court.—HON. LAWRENCE DE-GRAFF, Judge.

TUESDAY, DECEMBER 15, 1914.

REHEARING DENIED THURSDAY, JUNE 24, 1915.

ACTION for damages based upon alleged fraud in the trade of a note and mortgage, with representation as to the value of the land which secured the mortgage.—*Reversed*.

Stipp & Perry, for appellee.

S. G. Van Auken, for appellant.

WITHROW, J.—I. In February, 1911, the plaintiff traded to the defendant an automobile, the consideration received being a fourth mortgage, of the face value of something in excess of sixteen hundred dollars, on eight hundred acres of land in Winnebago county, against which were at the time existing a first mortgage of \$20,000, a second mortgage of \$10,000, held by other parties, and a third mortgage of \$10,000, which, at the time of the trade, was owned by the defendant. Plaintiff's action, as stated in its petition, is that it did not know the makers of the fourth mortgage, nor of their financial ability, and that in making the trade, it relied wholly upon the value of the mortgage, which depended upon the value of the land covered by the mortgage. It avers that, for the purpose of inducing plaintiff to make the trade, and to accept the note and fourth mortgage in payment for the automobile, the defendant represented that he had been over the land, and was familiar with it and with its value, and that it was worth \$85 an acre, and at forced sale would bring \$20,000 above all incumbrances; that Turkle, the maker

of the note and mortgage, had been offered \$85 an acre for the land, and had refused it. It is further alleged that defendant then said to Van Vliet, who was making the trade for the plaintiff, that he could rely on defendant's statement of value, and need not investigate the value; and that in reliance on said representation, the trade was made without plaintiff's looking at the land or ascertaining its value. The plaintiff charges that at such time the land was not worth \$85 an acre, and that Turkle, the holder of the legal title, had never been offered that amount for it; that such statements and representations were false and fraudulent, and were at the time so known to be by the defendant; that the land was worth less than the prior liens. Judgment was asked for \$1,650. The answer denies all fraudulent representations, and pleads that plaintiff investigated for itself, and acted and relied on its own judgment. It further claims that plaintiff caused suit in foreclosure to be brought on the fourth mortgage in April, 1911, and took judgment and decree in October, but took no valid judgment against Martha E. Turkle, one of the makers of the note, nor did they cause the real estate to be sold under execution, and since then they have done nothing to protect their rights or secure their claim, and the lien has been lost by reason of sale under foreclosure of a prior mortgage, from which the defendant did not redeem. By reason of such facts, an estoppel is claimed. A counterclaim was pleaded, going to the value of the automobile, but the issue arising out of that is not made the subject of complaint. Verdict and judgment were rendered in favor of the plaintiff and the defendant appeals.

II. Counsel for appellant states that one of the main propositions relied upon for a reversal, and for a judgment notwithstanding the verdict, is that there was a ratification

<p>1. FRAUD: contract induced by fraud: affirmance: right to recover damages.</p>	<p>and affirmance of the contract by the plaintiff, and an election by him to abide by it. This claim is based upon evidence which, it is urged, shows that plaintiffs, if they did not fully know the character of the land before the deal was</p>
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closed, at least within a short time thereafter had full knowledge of such, and that, notwithstanding such knowledge, they proceeded to foreclose the mortgage. Were this a proceeding for rescission of the contract, there would be more force in this contention; but on the contrary, as we understand the pleadings and the theory on which the case was tried, it is an action not for rescission nor cancellation, but for damages based upon fraud. The remedy of one who has been damaged by fraud which induced him to enter into a contract is not alone by way of rescission. He may affirm the contract, keeping what he has secured under it, and maintain an action to recover damages. *Coe v. Lindley*, 32 Iowa 437. Affirmance of the contract does not waive the fraud nor bar the right to recover damages, but bars a subsequent rescission. *Teachout v. Van Hoesen*, 76 Iowa 113; 9 Cyc. 432, and cases cited.

Appellant has cited many authorities in support of the proposition that where a party desires to rescind a contract on the ground of fraud, he must, upon the discovery of the fraud, announce his purpose, failing in which he will be deemed to have ratified the contract. That rule is recognized by the authorities generally to be controlling in actions to rescind; but is not governing in cases where, while accepting the fruits of a contract, one seeks to recover damages for fraud inducing it, whereby his benefits under it are lessened or destroyed. The appellee, as was its right, instituted foreclosure proceedings upon the fourth mortgage. Assuming, as claimed, that, at the time it so did, knowledge had been acquired which indicated that a fraud had been done in inducing the trade, it yet had the right to secure all the benefits that could come from its contract; and if they were less than the consideration paid for it, for the deficit an action at law for damages could be maintained, within the time required by statute for bringing suits in such cases. This conclusion covers the questions of waiver, estoppel, and election of remedies discussed by counsel.

III. The claim is made that, under the record, there is no proof of statements or representations which constitute fraud; that no trick or artifice was resorted to in order to

2. FRAUD: representations as to value: when actionable. prevent the appellee from investigating and ascertaining the value of the land; that the statements relied upon as being fraudulent

were at most mere expressions of opinion, and that the appellee took time after the offer to ascertain the condition and had full opportunity before completing the transaction to gain the necessary information to guide it in making the trade. Comprehended in this defensive claim are several elements which require separate consideration. The fraud relied upon in this case is in the statement of the value of the land. An amendment to the petition, alleging misrepresentation as to the character of the land, was withdrawn, and the cause was submitted upon the question of fraud in respect to representation of value alone. There are many cases which hold to the rule that an expression of opinion as to value of property will not ordinarily sustain an action for false representations. As sufficient to show the rule see *Bossingham v. Syck*, 118 Iowa 192; *Garrett v. Slavens*, 129 Iowa 107. But there are also many authorities to the effect that where the representation of value is intended to be taken as a fact, and as an inducement to the trade, the parties not having equal opportunities to know the truth, it may amount to a fraud on the buyer. *Ross v. Bolte*, 165 Iowa 499, *Mattauch v. Walsh Bros.*, 136 Iowa 225; *Hetland v. Bilstad*, 140 Iowa 411; *Dorr v. Cory*, 108 Iowa 725. It is under the rule of the cases last cited that appellee claims the right to recover, and the instructions of the trial court upon this branch of the case are based upon it.

While in this case there was, as between the parties to this action, no sale or trade of the real estate, there was the transfer of a security, the value of which, it is claimed, depended alone upon the value of the real estate against which

it was a lien; and a statement of value constituting a representation of a fact would not be actionable if the land was yet of sufficient value to satisfy all incumbrances against it, including the transferred mortgage. But if the land was of a value insufficient to meet the demands of the lien holders, if fraud as charged was committed, it would be actionable.

The proof on the part of the plaintiff tended to support the charge that representations were made by appellant to Van Vliet, substantially as pleaded, as to value, that appellant had been over it and knew its character, and that Turkle, the owner, had been offered \$85 an acre for it. In the cross-examination of Van Vliet, he stated that Crowell, the appellant, did not prevent him from going up to look at the land, but that he gave him such assurance that he did not think there was any need of going. Substantially the same testimony was given by Fletcher, the partner of Van Vliet. From this it is claimed that there was no act of the appellant which could properly have prevented the fact of value from being ascertained before the trade was completed, and, therefore, a charge of fraud could not be based upon what was said. The transaction between the parties was in Des Moines, where they both resided. The land was in a distant part of the state. It was winter and snow was on the ground, and this was referred to by the parties in their talk preceding the agreement, by Van Vliet especially, as a reason why by inspection he could not determine value, and, as he claims, connected with the statement of appellant in stating its value. It could not, therefore, be said as a conclusion of law under the facts that the means of knowing the value were equally open to both, and the cases which determine rights under such conditions do not apply. The fact that after the trade Van Vliet was in Winnebago county, where he had opportunity to see the land, was not the measure of his duty as to a contract entered into prior to that time.

Upon the question as to Crowell's knowledge of the value of the land at the time of the alleged representations to Van

Vliet, there is evidence by H. H. Armstrong to the effect that Crowell at one time came to his office on some other business, and, in the course of the conversation, stated that he had a \$10,000 mortgage on a Northern Iowa farm to trade. The farm was known to Armstrong, and upon being told by Crowell that he had traded a fourth mortgage on the land to the Van Vliet Fletcher Company, Armstrong said, "Those poor fellows won't get anything for that," upon which Crowell smiled, and said he did not think they would. This, in connection with facts as to value and the exhaustion of the value in the proceedings for foreclosure of prior mortgages, afforded proof of *scienter* sufficient to take the question of fraud to the jury.

IV. Instructions Nos. 1 and 2 are criticised, not that they do not state correctly abstract rules, but that in giving the elements necessary to be proven in this case was included that of knowledge of the fraud on the part of the one committing it. The question raised by this assignment of error is met by what we have said in the foregoing division of this opinion. Criticism is also made of the failure to instruct upon the questions of waiver, ratification and estoppel, discussed in the second division, and what we have there said renders it unnecessary to further comment upon the question of omitted instructions.

V. In the petition, it is averred that the note of Perry B. Turkle and Martha E. Turkle and the said fourth mortgage securing the same are, and were at the time, of no value.

It is argued by the appellant that it has not been shown that the makers are not solvent; also that there is a failure in proof of damages. There was no proof as to the financial ability of the Turkles. The consideration for the trade between the parties was the note and mortgage which were transferred to the plaintiff. The mortgage purported to represent an equitable interest in real estate, and that the value of the land was in

3. FRAUD: *scienter*: sufficiency of evidence to show.

4. FRAUD: purchase of secured note: fraud: affirmative: action for damages: worthlessness of security: insolvency of makers: necessity of proof.

excess of all liens. While it does not appear that any account was taken of the ability of the makers of the note to pay it, in the event of a failure of the security, where, as in this case, relief is sought not by way of rescission of the contract, but by bringing an action for damages based upon fraud, the plaintiff yet holding the consideration received in the trade, the measure of recovery would be not necessarily the full amount of the note and mortgage, but such amount as the face value of the paper would be reduced by its actual value. Assuming there to have been, as claimed, an entire failure in the value of the equity in the real estate, there might be value in the promissory note signed by the Turkles, and if there was such, it would be the duty of the plaintiff to allow and a right of the defendant to have credit for that value. Even though it may have been, as claimed, that appellee relied alone upon the value of the real estate security, that would not, in an action for damages without rescission, relieve from the duty of accounting for the reasonable value of the property which was received in the trade and retained. The insolvency of the makers of the note, before recovery of the full consideration could be had, was, therefore, necessary to be shown. The question was raised in the lower court in the motion for a new trial and the ruling was adverse to the appellant. In this, there was error.

VI. During the argument to the jury, counsel for appellee made reference to the testimony of a witness, Thompson, whose deposition was read at the trial. Counsel for appellant,

in his argument and in reply to the argument for the appellee, desired to read a few questions and answers from the deposition,

but, upon objection, was not permitted to do so. This refusal is assigned as error. While this court, in *Goodson v. Des Moines*, 66 Iowa 255, held that it was error to refuse such a request, in the later case of *McConkle v. Babcock*, 101 Iowa 126, it was held that the question was one of discretion in the trial court. The latter case was based upon the offer of transcribed portions of the evidence, but

5. TRIAL : argu-
ment : reading
depositions :
discretion of
court.

differs in effect in no way from the offer of part of a deposition. There was no error in this respect.

VII. In one of the instructions given by the trial court, the jury were permitted to consider, as bearing upon the value of the land, evidence which had been introduced as

6. FRAUD: character of land: materiality on value. to its character. In an amendment to the petition, plaintiff had claimed that there were false representations in terms as to the character of the mortgaged land, but their amendment was withdrawn. No statement of that claim was made to the jury. Many witnesses had testified as to value, and had described the land with some particularity. We discover no error in the instruction as limited. Value of real estate necessarily depends to some extent upon its quality, and proof of that fact is legitimate.

VIII. In the petition, claim was made for \$1,500, the amount of the mortgage, as the measure of damages, with the further sum of \$150 as expense incurred in the foreclosure.

7. APPEAL AND ERROR: unproved claim: failure to withdraw: verdict in justifiable amount. No proof was offered in support of the second item. In the statement of the issues, that claim was not submitted, but the amount of damages claimed was stated in the aggregate given in the petition. While it would have been proper for the trial court to have subtracted the unproved claim from the total, there was no error in failing to do so; for the proof in support of the charge fully justifies the verdict in the amount returned, which was \$1,400, and no prejudice resulted.

IX. Defendant offered evidence to prove that there was an increase of the value of the land from February, 1911, the time of the trade, to July, 1912, which was the expiration

8. FRAUD: sale of real estate junior mortgage security: damages: value "when redemption expires." of the redemption period under the foreclosure proceedings. The evidence was not admitted and error is assigned. The theory evidently adopted by the trial court in its ruling, and also in the instruction as to the measure of damages, was that the test was the value of the

land at the time of the transaction. As to land transactions, this undoubtedly is the rule. *Stoke v. Converse*, 153 Iowa 274; *Ross v. Bolte*, *supra*.

The rule does not directly apply to cases of this nature. The sale or trade was not of the real estate, but of an equitable right against it, subject to other liens. It could not be said that, if the value had actually been in excess of all liens, representation of larger value would be actionable. Nor can it be said that the sole measure of the plaintiff's right was the value at the time of the trade. The transaction contemplated that the superior rights of other persons in the real estate should first be determined and satisfied, before the fourth mortgage could be paid. That may have been by way of redemption, by independent proceedings in foreclosure, or by taking up superior liens by purchase and assignment. In this case, the plaintiff carried proceedings to judgment in foreclosure, but no farther. The second mortgage was foreclosed, sale was had under it, and rights of redemption arose. In exercising that right, the determination would be as a fair business proposition, and as the statement of a legal right, not what the security was worth at some prior time, but its value at the time of redemption. If then sufficient to meet all claims, no damages could result, for that very situation must be held to have been contemplated. If not sufficient, the deficiency, if the note itself were of no value, would be the measure of damages. Having permitted foreclosure sale to be made under the second mortgage, the plaintiff was not thereby deprived of its right under the fourth mortgage; and that right and its measure must be determined as of the time when it could have been exercised. In this view, evidence as to the value of the real estate at the time when redemption could have been made was competent and should have been received.

For the errors noted, the judgment is—*Reversed*.

LADD, C. J., DEEMER and GAYNOR, JJ., concur.

D. F. WILEY, Appellee, v. THE DEAN LAND COMPANY, Appellant.

EVIDENCE: Real Estate Values—Witness—Competency—Hearsay.

- 1 Competency to speak of real estate values may be based (a) on what has been learned in talking with others, (b) on observation and (c) on general knowledge of the subject.

PRINCIPLE APPLIED: Witness was raised on a farm, owned a farm in this state and was acquainted with land values in different states. Visited the land in question a year after the sale in question, and described it. Remained in the vicinity of the land several days, trying to look up land values. Talked about such values with the hotel keeper, with a farmer, with two real estate men who had recently bought land, and with friends who had bought land in that vicinity. By inquiry, he learned the value of different classes of land in the said vicinity, though some of the people talked to, he had never seen before or since. He based his estimate on what he had been told and on his observations. *Held*, qualified.

EVIDENCE: Real Estate Values—Selling Price as Evidence. When

- 2 a purchase and resale of real estate are practically simultaneous, the price at which the land was first purchased is admissible evidence of its value when resold.

PRINCIPLE APPLIED: Plaintiff claimed he was defrauded in the value of land sold him by defendant. "Shortly before" the sale to plaintiff, defendant had contracted for the land from the then owner. On the day defendant secured his deed, he reconveyed to plaintiff. *Held*, what defendant gave for the property was admissible evidence of its value when plaintiff received it.

DEPOSITIONS: Admissibility by Party Other Than Taker—Order

- 3 of Proof. A deposition taken by defendant to sustain his defense may be introduced by plaintiff in chief. No rule against the order of proof is thereby violated.

Appeal from Linn District Court.—HON MILO P. SMITH, Judge.

THURSDAY, JUNE 24, 1915.

ACTION for damages alleged to have been suffered by plaintiff in consequence of misrepresentation as to quality of land sold to him by the defendant. There was a verdict and judgment thereon for plaintiff, and defendant appeals.—*Affirmed.*

Rickel & Dennis, for appellee.

Lewis Heins, for appellant.

LADD, J.—I. The main issue was whether defendant fraudulently misrepresented the quality of a quarter section of land in Mahnomen county, Minnesota, and thereby induced plaintiff to buy the same. The evidence was ample to carry that issue to the jury. The contention of appellant is that the evidence bearing on the measure of damages was insufficient, in that the witnesses testifying to value were incompetent. The plaintiff went to examine the land about a year after the purchase, described it, made inquiries “to ascertain the value of good upland prairie land,” and, as he testified, ascertained its value to be \$25 per acre. Subsequently he testified that, at the time he visited the land, he made inquiries with reference to ascertaining the value of good choice prairie land there, and learned that it was worth \$35 to \$40 an acre; that the land purchased of defendant was then worth \$10 an acre; that he was raised on a farm and acquainted with the value of land in different states, and owned a farm in Ida county; that he knew of the sale of no other piece of land in the neighborhood of the land in controversy, but was in the vicinity of this land two days, talked with the hotel keeper, two real estate men, who had been buying land recently, and a farmer, concerning land values there; that he had never seen these people before or since and that his knowledge of the value of land there was merely what he had heard and from correspondence concerning the same. On cross-examination, he asserted that he was there nearly a week, talked

1. EVIDENCE:
real estate
values: wit-
ness: compe-
tency: hearsay.

with a good many; that he could not recollect all he talked with, but tried "to look up what lands were worth"; that he wrote to the "State Emigration people and got a lot of literature from them," and also from friends who had bought in that neighborhood, and that he based his estimate of the value of the land upon the information he obtained, as well as his own observation and examination of the soil. No argument is required to demonstrate the correctness of the court's ruling that the witness was qualified to express an opinion as to the value of the land. That much of his information was derived from others is not objectionable, for, necessarily, knowledge of values is largely so acquired and the hearsay rule is without application. 3 Chamberlayne on Ev., Sec. 2099c; Jones on Ev. (2d Ed.) 374.

II. Evidence of what defendant paid for the land was received over objection. The deed was delivered to it on the same day it conveyed the land to plaintiff, though having contracted to purchase shortly before. What a tract of land sells for about the time of the transaction under investigation is competent evidence of its market value then, and there was no error in overruling the objection. *Swanson v. Ry.*, 116 Iowa 304; *Dorr v. Cory*, 108 Iowa 725; *Carnego v. Crescent Coal Co.*, 164 Iowa 552.

III. Counsel for appellant argues that the court permitted plaintiff to introduce evidence in chief concerning sales of other lands near by and the prices received. It appears that defendant took the deposition of one Leith, who testified that the land in controversy was worth \$20 or \$25 per acre. On cross-examination, plaintiff drew out of him the statement that prairie land in the neighborhood had sold for \$10 or \$11 per acre. Though taken by defendant, the deposition was read to the jury by plaintiff, and furnishes the only ground for the contention. The mere fact that a party other than the one taking the deposition reads it in evidence

2. EVIDENCE:
real estate
values: sell-
ing price as
evidence.

3. DEPOSITIONS:
admissibility
by party other
than taker:
order of proof.

does not change the order of examining the witness nor transpose cross-examination into direct examination—and here the prices for which neighboring lands were sold were ascertained on cross-examination—even though the questions were propounded by the party subsequently introducing the deposition. The rule laid down in *Hubbell v. City of Des Moines*, 166 Iowa 581, was not violated.

The record is without error and the judgment is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

NICHOLAS COLSCH, SR., Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

CARRIERS: Live Stock Shipment—Non-negligence in Speed of Train

- 1 **—Negligence en route—Instructions.** Even though a train carrying stock is operated on schedule time and at proper speed, yet the carrier will be responsible in damages for failure to afford reasonable protection to the stock during a long but necessary delay at a siding. So held where stock was frozen during a long delay, in an exposed condition at a siding. Separate instructions elaborating these two propositions are held to be perfectly harmonious.

CARRIERS: Live Stock—Natural Vices—Perils of Road—Negligence

- 2 **of Shipper.** A carrier is not liable for damages to a shipment of cattle caused by (a) the ordinary perils of the road, (b) the natural propensities or inherent vices of the animals, and (c) the negligence of the shipper. Instructions held to properly present the doctrine.

CARRIERS: Live Stock—Damages from Freezing—Sufficiency of

- 3 **Evidence.** A finding that the injury to cattle during shipment was caused by freezing will not be disturbed when the evidence thereon was in conflict, the record farther showing the state of the thermometer during one evening of the shipment and that the weather “was growing colder.”

CARRIERS: Live Stock—Damages from Freezing—Notice to Car-

- 4 **rier—Instructions.** Where, during the shipment of cattle, the shipper told the conductor of the condition of the cattle and of

the danger from freezing, it was proper to instruct the jury that such information was sufficient notice to the carrier. Such instruction is not, in fairness, a misleading statement as to the duty or obligation of the carrier.

EVIDENCE: Expert Testimony—Overloading Stock Cars. Witnesses
5 familiar with the cars carrying the stock shipment in question may give their opinion as to the number of cattle which may be loaded into a car without overloading the same.

WITNESSES: Evidence — Cross-Examination — Overloading Stock
6 **Cars.** An expert witness having testified to the number and weight of cattle which could be loaded into a certain car without overcrowding, *held*, he should have been permitted on cross-examination, in view of the record, to testify as to the number of calves of certain weight which he would include in his estimate. *Held*, the exclusion of the answer was nonprejudicial because fully covered by other witnesses.

CARRIERS: Live Stock—Duty to Protect—Lack of Facilities. Lack
7 of equipment with which to care for shipments of live stock is a poor excuse for the carrier's failure to meet its obligation. So *held* where, on account of the lightness of business, the carrier had no engine at a siding, with consequence that a shipment of stock was long exposed to inclement weather and was severely frozen.

TRIAL: Instruction—Assumption of Truth of Undisputed Fact. A
8 fact, testified to by an interested witness, and not denied, and with no attendant circumstance casting doubt upon the matter of veracity, may be treated in the instructions as true.

PRINCIPLE APPLIED: Plaintiff complained that his shipment of live stock was sidetracked for many hours in inclement weather and severely frozen, because of the failure of the carrier to so place the car that the cattle could be unloaded. He testified that on two occasions he informed the carrier's agent of the condition of the stock and the necessity for protection. This statement was not questioned by any witness or by any circumstance. *Held*, the court could well assume it was true.

CARRIERS: Live Stock—Shipper as Caretaker—Effect on Carrier's
9 **Possession.** The fact that the shipper accompanies his shipment of stock as a caretaker does not render inaccurate an instruction that the stock was "in the possession and under the control of the carrier."

CARRIERS: Live Stock—Shipper's Knowledge of Weather—Un-
 10 **necessary Exposure to Weather by Carrier.** Irrespective of the knowledge of the shipper as to the condition of the weather when delivering live stock to the carrier, the carrier must, after receiving the same, exercise reasonable care to protect it from unnecessary exposure to the weather. So held where the carrier sidetracked the car and unnecessarily exposed the stock for some hours to inclement weather.

Appeal from Allamakee District Court.—HON. A. N. HOBSON, Judge.

WEDNESDAY, JUNE 30, 1915.

ACTION to recover damages to cattle, consequent on defendant's alleged negligence, resulted in a judgment against defendant, from which it appeals.—*Affirmed.*

W. S. Hart, for appellee.

Cook, Hughes & Sutherland, and *H. H. Stillwell*, for appellant.

LADD, J.—I. The issues are stated in the opinion filed on the former appeal, 149 Iowa 176. The cause was again tried in September, 1911, and a verdict returned for \$500.00 as damages and \$331.25 interest.

The first complaint is that portions of instructions 10 and 13 are contradictory. In the latter, the jury was told that there was no evidence that the defendant agreed to transport the carload of cattle from South St. Paul to Lansing on a faster train or schedule of time than it did, or that it was not transported at proper speed or on proper time. The former instruction reads:

1. **CARRIERS: live stock shipment: non-negligence in speed of train: negligence en route: instructions.**

“If you find from the evidence that there was delay in the transportation of the cattle, or that plaintiff complained to the conductor in charge of the train of the condition of the cattle, the defendant was in either event required to exercise ordinary and reasonable care during their delay and

also while in transit for their safety and protection. If the removal of the cattle from the car during the delay or at any time while in the defendant's possession was necessary for their protection from injury, and in the exercise of such ordinary and reasonable care on defendant's part it was possible to remove them, defendant was bound to do so, and was bound to give them whatever attention was necessary for their protection during the whole time the cattle were in possession of defendant. When the defendant contracted to carry the cattle to their destination, the law imposed upon it an obligation to carry them in a proper manner and deliver them in good condition considering the ordinary perils of the road, and the natural propensities of the animals themselves, and if it failed to deliver them in such condition, it is responsible in damages (if any) unless it appears from the evidence that such damages were caused by the acts of plaintiff, his servants or agents, and the burden of proof rests upon plaintiff to establish by a preponderance of the evidence before you that defendant was negligent in these respects, and that neither his own acts or those of his servants and agents caused the injuries complained of."

One instruction merely advised the jury that there was no agreement with reference to a faster train or a faster schedule than that at which the cattle were carried, and that the car was hauled at a proper speed and no more time consumed than defendant might take; but for all this, there might have been and were in fact delays on the way, especially at Newport and River Junction, and the duty devolved on defendant to exercise the care defined in the instruction at these points. The delay referred to in the 10th instruction was that incident to the hauling of the cattle, as when switching or in making up the train and the like, while instruction 13 relates to the speed of the train and whether it moved on proper time. In other words, the subjects are distinct and there is no conflict whatever.

II. Exception is taken to the last half of the 10th in-

struction for that, as is contended, "it failed to point out to the jury that the defendant would not be liable for damages due to the acts of the animals themselves, such as fighting, boring and unruliness of the animals." The carrier is not liable for damages occasioned by the natural propensities or inherent vices of animals being transported, and this instruction plainly recognizes such to be the law. The obligation of the defendant to deliver in good condition is limited by exacting the consideration of the perils of the road and the natural propensities of the animals themselves, and if, considering these, it failed to deliver them in the condition received, it was responsible for the damages, unless these were occasioned by the neglect of the plaintiff or his agent. See *Gilbert Bros. v. Ry.*, 156 Iowa 440. Under the instruction, it is only upon the failure of the defendant to deliver the cattle "in such condition"—that is, in as good condition as when received, considering the ordinary perils of the road and the natural propensities of the animals themselves—and the instruction, fairly construed, proceeds to say that even then these may not be recovered unless resulting without any negligence on the part of the plaintiff. The instruction was not likely to be misunderstood by the jury. Even though a train may move at a proper speed and make the trip on scheduled time, this would in no manner relieve the company of the consequences of any negligence in the manner of caring for the stock being transported during any necessary delay at stations or when moving on the road, and this is the purport of the two instructions.

III. The court submitted this interrogatory to the jury: "Was the injury to the stock caused by freezing?" A. "Yes." Appellants contend that the answer was contrary to the established facts and therefore evidenced such passion and prejudice that a new trial should have been awarded. See *Baldwin v. Ry.*, 63 Iowa 210; *Spicer v. Webster City*, 118 Iowa 561. This inquiry was not limited to the time the

2. CARRIERS: live
stock: natural
vices: perils
of road: neg-
ligence of
shipper.

3. CARRIERS: live
stock: dam-
ages from
freezing: suf-
ficiency of evi-
dence.

car was standing on the sidetrack at Newport, as is assumed by appellant, but had reference to the time during transportation. Even if the record at the government weather office at St. Paul, eight miles away, indicated that the thermometer registered from 20 to 26 degrees above zero, there on the sidetrack the weather might have become much colder, and especially before reaching the destination at Lansing. It appeared that the car containing the cattle was exposed to a high wind at Newport for three or four hours, with the thermometer at from 20 to 26 degrees above zero, and it was growing colder; and it stood on another sidetrack later on, and even though a couple of veterinarians thought the cattle could not have frozen, other witnesses testified that they did, and it seems hardly necessary to add that there was sufficient evidence to sustain the finding.

IV. In instruction 9, the court advised the jury that complaint to the conductor during the progress of the train was sufficient notice to the company. This is said to be mis-

leading with reference to the duty of the company and threw all the burden on it. Nothing but a vivid imagination could draw such an inference, for the instruction is subject to no other interpretation than that it advised as to what would be "sufficient notice to the company."

V. Evidence which should have been adduced in chief is said to have been introduced in rebuttal. Even if this were so, the order in which the evidence shall be received is

discretionary with the trial court, and no abuse of such discretion appears in this case. The defendant introduced evidence tending to show that the car was overcrowded and that

this occasioned injury to part or all of the cattle. On rebuttal, the defendant called witnesses who testified that they were familiar with cars such as that conveying the cattle, and that 62 head of cattle, such as those hauled, might be placed

4. CARRIERS:
live stock:
damages from
freezing: no-
tice to car-
rier: instruc-
tions.

5. EVIDENCE:
expert testi-
mony: over-
loading stock
cars.

in a car without overcrowding. The objection seems to be that this was not proper as expert testimony, and not based on facts disclosed. The testimony related to matters not familiar to the ordinary juror. Witness Schwartzhoff was

6. WITNESSES :
evidence :
cross-examina-
tion : overload-
ing stock cars.

asked this question: "Assuming 62 head of mixed western cattle, running in sizes from calves of 126 lbs. to 1,000 lbs. in medium flesh, and the load weighing in the neighborhood of

22,000 lbs., would the car be overcrowded?" "A. No, sir."

The witness had previously testified that he had never had any difficulty in loading a car such as that in question above the minimum capacity without crowding the stock. That he had put about 26 or 28 thousand pounds in a car and more; that the car would not be overcrowded when the weight is less than 25,000 lbs. On cross-examination the witness was asked: "In that assumption, how many calves would you include?" This was objected to on the ground that the question did not inquire the number of calves, but merely the number of cattle and the gross weight, and the objection was sustained. Q. "You can tell how many you would include that weighed 1,000 lbs., can't you?" The objection as incompetent, irrelevant and immaterial was sustained, and another question as to how many cattle weighing 800 lbs. he would include was asked, and a like objection sustained. Appellant contends that an indefinite question was asked and the defendant was denied the opportunity of testing the accuracy of the testimony given, or the basis upon which it rested. The objections might well have been overruled. It is to be said, however, that the witness had testified with reference to weight rather than number of cattle which might be loaded in the car, and as other witnesses had gone over the same ground in cross-examination, we are inclined to say that the error was without prejudice.

VI. A witness was asked this question: "Is Newport a place at which there is sufficient work to keep an engine?"

An objection as incompetent, irrelevant and immaterial was sustained, and rightly so. The failure to keep an engine at that place was not alleged as a ground of negligence, and whether it was bound to do any switching there depended on the circumstances, and not upon the amount of switching to be done or whether it would have been feasible for defendant to have maintained a switching engine at that point. The obligation of the defendant was to exercise ordinary care for the protection of the cattle in view of the inclemency of the weather; and if, in view of having shunted the car on the sidetrack at Newport, it was necessary, in order to exercise such care, to unload the stock or to remove the car from that locality, the fact of not having sufficient business to require the constant use of a switch engine at that place would furnish it no excuse for not meeting its obligations. The ruling has our approval.

VII. The court instructed the jury that the undisputed evidence showed that the car of cattle was in the possession of the defendant between three and four hours at Newport before being forwarded, and that, while there, the plaintiff notified an employee of the defendant, who was in charge of the station, that the cattle were suffering and should be unloaded, and advised that this was sufficient notice to require the defendant to take such steps as might be necessary to protect such cattle. Colsch testified to informing the operator in charge of the station of the condition of the cattle on two different occasions, and demanding their removal from the cars. This is not denied by such employee or any other witness, and no circumstances casting doubt upon the testimony were proven; and yet appellant contends that, as plaintiff was an interested witness, the issue as to whether he in fact gave the notice ought to have been submitted to the jury. Had any facts been shown tending to cast doubt on the testimony or the veracity of the witness, a different ques-

7. CARRIERS: live stock: duty to protect: lack of facilities.

8. TRIAL: instruction: assumption of truth of undisputed fact.

tion would be presented and the authorities cited by appellant somewhat in point. In *Joy v. Diefendorf*, 130 N. Y. 6, 27 Am. St. 484, evidence on the part of the defendant was sufficient to warrant the conclusion that a note had been obtained through fraud, and the testimony of good faith on the part of the purchaser by the cashier of a bank, though undisputed, merely carried that issue to the jury and was in line with the authorities holding that testimony, though undisputed, is not conclusive where doubt is cast on the veracity of the witness by circumstances appearing at the trial. That is not the situation here, and if the jury had found against the undisputed evidence of notice, it would have been good ground for a new trial, and therefore an issue was not raised for the jury, and the court rightly assumed the fact as testified by the witness.

VIII. Exception is taken to the fourth instruction, in that it recited that the car of cattle was on the sidetrack at Newport from about eight o'clock in the evening till eleven-twenty o'clock of the same night, and during that time, was "in the possession and under the control of the defendant as a common carrier." The car was taken by the defendant from the stockyards in South St. Paul a little after seven o'clock in the evening. The train stopped at Newport, about five miles distant, for about four hours, and all that this instruction indicates is that in the meantime the cattle were in the possession of the defendant as a common carrier. This is questioned on the ground that the plaintiff accompanied the car as caretaker; but that in no manner relieved the defendant of its obligations as a common carrier. Appellant contends that the verdict was contrary to the evidence, and therefore a new trial should be granted. A review of the evidence is not necessary, for it leaves no doubt that there was sufficient to carry the issues to the jury.

IX. Complaint is made of the refusal of the court to give the following instruction:

9. CARRIERS: live stock: shipper as caretaker: effect on carrier's possession.

“The plaintiff tendered his cattle for shipment on the evening in question and in doing so assumed the risk of the conditions of the weather at that time, or such changes as might suddenly occur by reason of sudden lowering of the temperature, therefore, if you find that the injury complained of was due to a sudden lowering of the temperature, or to the conditions of the weather at the time plaintiff tendered the shipment to the defendant, then you will find for defendant.”

10. CARRIERS:
live stock:
shipper's
knowledge of
weather: un-
necessary ex-
posure to
weather by
carrier.

It is said in support of this that the plaintiff, when the cattle were loaded, was aware of weather conditions, and that there was no substantial change in the weather after the cattle were loaded, and the defendant was not bound to keep an engine at Newport so that the cattle could be unloaded. All this may be conceded; and yet the defendant had possession of the car as a common carrier and was required to exercise that degree of care for the protection of the stock that a reasonable, cautious and prudent man would under like circumstances. In switching the car and shunting it on the side-track, it was bound to exercise reasonable care in so placing it as not to unnecessarily expose the cattle to the inclemency of the weather; and if it did place the car where it was unnecessarily exposed, it was its duty to do what was necessary in the exercise of reasonable care to protect the stock while there, or, if the exercise of such care so required, to remove or enable the caretaker to remove the cattle from the car if reasonably essential for their protection. Even though cattle might not freeze with the thermometer at 26 degrees above zero, when exposed to the wind moving at 10 miles an hour, if allowed to remain in such condition a long time, we are not prepared to say that they might not be injured thereby and be more likely to freeze on the subsequent journey. Counsel rightly contend that the company was not required as a matter of law to maintain a switch engine at Newport, but it was

required to do all, in the care of the stock delivered to it for carriage, reasonable and necessary for its proper care and protection; and whether it was bound to place the car in a position where it might be unloaded, or remove it from its exposed condition in which it had placed it, depended entirely upon the ordinary care which was exacted from it. Of course, there might be circumstances under which cattle might freeze without fault on the part of the carrier; but in this case it was a fair question for the jury whether the defendant exercised ordinary care in the protection of the cattle during transportation, and if it failed so to do, whether the cattle were injured and lost in consequence of such omission.

There was no error, and the judgment is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

W. H. LAUBSCHER, Appellee, v. WILLIAM MIXELL, Appellant.

BROKERS: Finding Purchaser—Earning Commission—Sale of Homestead—Failure to Produce Spouse. To be entitled to a commission where no sale or trade is actually made, a broker employed to find a purchaser or one who will trade must do one of two things, to wit, (a) *produce to his principal* a customer who is able, ready and willing to buy or trade on the terms fixed by the principal, or (b) take from the customer a binding contract of purchase or trade. The broker produced a husband owning and occupying a homestead, but not the wife. *Held*, commission not earned. (Sec. 2974, Code, 1897.)

PRINCIPLE APPLIED: A broker was employed by his principal to consummate a trade of the principal's farm for a certain 20 acres then occupied by a husband and wife as a homestead. After negotiations, the broker brought the husband (who owned the 20 acres) to his principal, and the husband then accepted the terms demanded by the principal, and offered to enter into a contract. The principal declined. The wife of the homestead owner was not *produced*. She had told the broker and her husband, but no one else, that she was willing to make the trade, and had told her husband he could sign a contract for her. She never signed any contract, but would have signed any necessary to effect the trade on the said terms. *Held*, commission was not

earned. See Sec. 2974, Code, 1897, requiring conveyances of the homestead to be only by *joint* conveyance of husband and wife.

Appeal from Cedar District Court.—HON. F. O. ELLISON,
Judge.

WEDNESDAY, JUNE 30, 1915.

ACTION to recover a commission alleged to have been earned in procuring an exchange of tracts of land resulted in a verdict and judgment as prayed. The defendant appeals.—*Reversed.*

C. O. Boling, W. G. W. Geiger, for appellee.

J. C. France, for appellant.

LADD, J.—Defendant owned a farm of 140 acres in Howard county, and the evidence was such that the jury might have found that he employed plaintiff to procure an exchange for a farm of 20 acres near Mt. Vernon,

1. **BROKERS:** finding purchaser: earning commission: sale of homestead: failure to produce spouse.

owned by John Fulwider. After some negotiations, the defendant, on Saturday, offered to exchange by accepting \$14,000 for his land and allowing \$11,000 for that of Fulwider. Fulwider was notified of this on Monday following, and signified his acceptance of the proposition on Wednesday, and offered to enter into a contract stipulating for the exchange of deeds and the payment of the difference on March 1st following. Thereupon, the defendant stated that he would not close the deal. The evidence disclosed that the 20 acres of land belonging to Fulwider was occupied by himself and wife as a homestead, that his wife was willing to make the exchange, had so informed plaintiff, and would have signed any contract presented for the purpose of effecting the exchange, but had signified her assent to the acceptance of defendant's offer to no one except her husband, whom she told he could sign a contract for her, but was never requested to sign a contract. She was not at Tipton at the time her

husband offered to enter into the contract. On the other hand, the defendant testified that he had informed plaintiff that unless the deal was made on Monday, it would be off, as he had to make an answer to indicate what he would do in the matter of an exchange with another party, and that a contract was never tendered to him. It will be observed that no written contract was entered into and none tendered which would be enforceable.

Sec. 2974 of the Code provides that:

“No conveyance or incumbrance of or contract to convey or incumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer.”

This statute cannot be obviated by the oral assent of the wife. *Donner v. Redenbaugh*, 61 Iowa 269; *Stinson v. Richardson*, 44 Iowa 373. It is well settled that a contract made by the husband for the disposition of the homestead where the wife does not join, cannot be specifically enforced. *Wheelock v. Countryman*, 133 Iowa 289; *Hostetler v. Eddy*, 128 Iowa 401. The principle is well settled that where an agent undertakes to find a purchaser or one who will exchange properties, it is incumbent upon him to furnish a person ready, able and willing to buy or exchange on the terms fixed. To accomplish this, where the exchange or sale is not actually made and no written contract entered into, the vendor and proposed purchaser must be brought together so that the principal may secure a valid and enforceable contract if he wishes so to do. The proposition should be to the principal, to the end that the statute of frauds may be obviated by reducing the agreement to writing. *Beamer v. Stuber*, 164 Iowa 309; *Johnson v. Wright*, 124 Iowa 61. While the plaintiff procured Fulwider, who was ready and willing to

make the exchange, he was unable to enter into a valid contract so to do, for that his wife's signature to such contract was essential to its validity and she was not present, nor did he tender such a contract. It is no answer to say that he was entitled to a reasonable time, for there is no showing that he has since tendered such a contract as contemplated. It is suggested that the defendant based his refusal to carry out the deal on another ground, i. e., that he had withdrawn his proposition. If this were true, no such issue was presented to the jury, and the instructions, in so far as not excepted to, must be treated as embodying the law of the case. Because of not having found a purchaser able to enter into an enforceable contract, the judgment is *Reversed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

W. L. PELTON, Appellee, v. ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

MASTER AND SERVANT: Employment of Servant—Sufficient Evidence of—Federal Employer's Liability Act. An employment "in interstate commerce" is essential to the maintenance of an action under the Federal Employer's Liability Act. Evidence held sufficient to show that plaintiff was such employee, and not a mere passenger.

MASTER AND SERVANT: Rules—Practical Construction of—Riding on Engine. A rule forbidding any person to ride on an engine, except employees in the discharge of their duty, has no application to a head brakeman when such place was the customary place where the head brakeman rode, when he was directed by the conductor to ride on the engine, and such had been the practical construction of the rule.

APPEAL AND ERROR: Inviting Instruction—Estoppel. One inviting a certain action by the court must not complain if the court accepts the invitation.

PRINCIPLE APPLIED: Defendant pleaded a so-called "assumption of risk," requested instruction thereon and one was given practically as asked. *Held*, court would not give ear to the

claim that the pleading added nothing to the general denial because it amounted to nothing more than a superfluous pleading of "assumption of risk naturally incident to the work, regardless of negligence."

APPEAL AND ERROR: Pleading—Specifications of Negligence—

4 **Proving Others.** Whether the failure to prove defendant guilty of the particular negligence specified, but proving defendant guilty of another confessedly negligent act, *and the proximate cause of the injury*, presents such exceptional situation as to justify the affirmance of a verdict of recovery, *quaere*.

APPEAL AND ERROR: Verdict—Support in Evidence. A verdict

5 on fair conflict of evidence will not be disturbed.

APPEAL AND ERROR: Instructions—Omission of Fully Established

6 **Issue.** The failure to submit an issue fully determined and established by the evidence is not error.

PRINCIPLE APPLIED: In an action for personal injury under the Federal Employer's Liability Act, the court failed, in first stating the issues, to require the jury to find "that plaintiff, in order to recover, must show he was employed in *inter-state commerce* at the time he was injured." In a later instruction the issue was submitted, but appellant claimed that this amounted to no more than an attempt to correct an erroneous instruction by contradicting it. *Held*, such omitted matter being fully established in the evidence, the court might have peremptorily instructed that the same was established, and therefore no prejudicial error occurred.

DAMAGES: Excessive Verdict—Personal Injury. Verdict of \$20,000

7 reduced by trial court to \$14,000 *held* not excessive under facts of instant case.

PRINCIPLE APPLIED: Plaintiff injured in jumping from engine in order to avoid collision. Trial over two years after accident. Plaintiff has a permanently stiffened knee, a curvature of the spine and some paralysis. Vertebrae of spine forced out of normal position, resulting in a pinching of the nerves. Unable to walk without crutches. Suffers from nervous disorders. Earning capacity wholly destroyed. Helpless condition is probably permanent. Prior to injury was earning from \$100 to \$145 per month.

Appeal from Webster District Court.—HON. R. M. WRIGHT, Judge.

SATURDAY, DECEMBER 19, 1914,

REHEARING DENIED WEDNESDAY, JUNE 30, 1915.

ACTION for damages for personal injuries to an alleged employee. There was a verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed*.

Kenyon, Kelleher & O'Connor and *Price & Joyce*, for appellee.

Hellsell & Hellsell, for appellant.

EVANS, J.—1. Action was brought under the Federal Employer's Liability Act. The petition alleged that the plaintiff was a brakeman in the regular employment of the defendant railroad company, and that he was injured through the negligence of the company. It is also averred that the defendant was then and there engaged in interstate commerce, and that the injury of the plaintiff was sustained "while he was employed by such carrier in such commerce." The answer was a general denial, and pleas of contributory negligence and assumption of risk.

One of the questions put forward by appellant is whether, at the time of the injury, the plaintiff himself was employed by the defendant in interstate commerce. And this depends

1. MASTER AND SERVANT: employment of servant: sufficient evidence of: Federal Employer's Liability Act. upon the question whether, at the time of the injury, the plaintiff was employed in the operation of the train upon which he was riding, or whether he was riding thereon as a passenger to Fort Dodge, which was one of the terminals of his ordinary run as brakeman. The plaintiff was concededly an employee of the defendant, and had been for some years. He was engaged as head brakeman, and was one of a through freight crew. This train crew consisted of conductor Emory, head brakeman Pelton, and rear brakeman Fuhrman. The engine crew consisted of engineer Haviland and fireman Johnson. The above named generally worked

together as one crew upon "through freight" trains. Their run was from Fort Dodge to Council Bluffs. The accident in question happened upon a passenger train and on November 20, 1911. The crew above named was in charge of that particular train, under special orders to that effect.

Whether such order included the plaintiff or imposed any duty upon him with reference to such train is one of the questions raised in argument, the defendant contending that there was insufficient evidence to support an affirmative finding on that question. The defendant concedes that that particular train was engaged in interstate commerce at the time. But it contends that the burden was upon the plaintiff to prove that he was engaged in such commerce; that is, that his employment related to the operation of that particular train at that time. Plaintiff's counsel concede that this burden is upon them, and contend that the evidence is abundant to support such burden. It appears from the evidence that the defendant's regular through passenger train, known as No. 2, was due to leave Council Bluffs for the east about 6 P. M. On the day in question, it was held for a brief time to await the arrival of a car over the Union Pacific Railroad, which car was occupied by a company of soldiers, destined for some eastern point. The delay in the arrival of such car over the Union Pacific was such that the defendant company sent on this passenger train No. 2 without waiting for it. At the same time, it ordered a special train to be made up, for the purpose of transporting the car of soldiers as soon as it should arrive. Such special train was run as section 2 of No. 2. It was deemed as a first-class passenger train, and entitled to the same rights and subject to the same regulations.

The natural inference from the record is that there was no regular train crew available for use upon this temporary train. Conductor Emory and his crew were in Council Bluffs, having brought in a through freight train the day before. The superintendent of the defendant company, through the train dispatcher, directed this crew to take such train from

Council Bluffs to Fort Dodge. There is no substantial dispute up to this point. It is the contention of the defendant, however, that such order of the superintendent did not contemplate the inclusion of the plaintiff as a member of the crew, because only one brakeman is included in a passenger train crew, and that the plaintiff, as head brakeman, was, therefore, unnecessary for the purpose of operating this train.

The testimony for the plaintiff tends to show that he was in fact called out as a member of the crew by the regular "caller," in the regular way, and assigned to this train as a member of such crew. Such call included both the engine crew and the train crew.

The plaintiff testified as follows:

"I was at my brother's residence at Council Bluffs at the time of the call. I was called by the call boy along about 6:30 for 7:30 P. M." Q. "What call boy?" A. "The caller for the Illinois Central. I didn't know the call boy only by sight. I had seen him before. I had been called by him." Judge Helsell: "Well, I don't remember whether there is anything more in that answer but I move to strike out from the answer that part of it which says 'call boy for the Illinois Central Railroad' as incompetent and the foundation not laid." (Motion denied. Defendant excepts.) A. "I wasn't given a specified time before the departure of that train. I proceeded from the passenger depot to the yard office and asked the yardmaster where my caboose was and he told me on the main line. I went to my caboose, took my lantern and lit it and went to the roundhouse, expecting to find my engine there. The engineer and fireman were already there and the engine ready to proceed to the depot. I threw the switch and let them out and gave them the signal to back up, which they did. I hadn't seen anyone in the meantime, nor received any instructions. I didn't see Mr. Emory. Mr. Fuhrman wasn't there when I left the depot. I rode on the engine to the depot, back to the yard office where we picked up the caboose.

It was standing on the main line and had been thrown out there by the switch engine, I suppose. We coupled on to it and backed to the passenger station. I coupled it myself. I rode back to the depot on the front end of the caboose. That was about 7:00 P. M. We then came to what we call the cross-over switch near the depot, and gave him a stop signal and cut off and lined the switch in through the cut-off so he could get in on the Union Pacific transfer, where I knew that the switch engine would back in on with the coach. That was to be put in ahead of our caboose. I knew about the tourist coach because I had been told of it by the yardmaster. The caboose was then cut off from the engine. I cut it off on one side of the cars and let him go ahead through the switch and put him on what they call the east main south track. I mean that I let him head down the track, that is, the engineer, W. J. Haviland. The fireman was C. O. Johnson. After they headed down there, I lined my main line switch back for the main line through there and threw my cut-off switch so when they came down the main line it would be in position for them to back up, when they came in from the cut-off. After that, I went back to the way car and changed my clothes. I found the rear brakeman, Mr. Fuhrman, there changing his clothes. I didn't see Emory at that time, it was about 7:40 before this tourist car was brought back there by the switch engine. When they came up, the Illinois Central switch engine, located at Council Bluffs, backed the coach in onto our caboose. Then next I lined Mr. Emory back so he could go out and get them started. I mean the cut-off switch. I then went up and talked to the rear brakeman. The switch engine went down in the yards. My engine was just over the crossing. They coupled the coach onto the way car. The caboose, coach, and engine, when they were all coupled together, were just a little north of the passenger station and they departed from that point. I saw Mr. Emory when he came out with the orders to give to the engineer. I didn't see the orders at all." Q. "What did Mr. Emory, if anything, say to you?" A. "Go

ride ahead.' That is an expression that is used in railroad parlance and means, to railroad men, to ride the engine. Mr. Emory was the conductor of that train. He gave the signal to go and I climbed upon the engine with the engineer and firemen. I had not examined these orders. We left Council Bluffs at 8:00 o'clock P. M. I rode on the engine up to the point of the collision." Q. "What were your duties on this train?" (Objected to, as sufficient foundation has not been laid and it calls for the conclusion and opinion of the witness, a matter that is one of the issues to be determined by the jury in the case.) A. "The customary duties are to take my engine from my train and to bring my engine from the roundhouse to the train." Senator Kenyon: Q. "Well I refer now to when the train was in operation, after leaving Council Bluffs." A. "Oh, take the head end, if necessary, in case of emergency. I paid attention to the train as we were running between Council Bluffs and Logan. I looked back to see if everything was all right, looked out of the cab window. I did that occasionally."

Conductor Emory testified as follows:

"Am now employed by the Illinois Central as a freight conductor. Have been such a conductor for 15 years. Before that time, I was a brakeman. My time is not entirely taken up with my work as a freight conductor. Sometimes I run passenger trains, sometimes freight. I have a certain number of brakeman in my crew. I have two brakemen, as a general rule. We go together; but when we are called upon from freight service to run a passenger train, we do not go together. Certainly not, if we run a regular run, but if we run an extra run we do. I am sometimes called as a conductor to take care of an extra passenger run. Running a second section of a train is the same thing as running a passenger train, except that the only difference is a freight crew is on it. When we are running an extra, sometimes we take our full crew and sometimes we don't. I remember the occa-

sion of the accident concerning which the evidence has been introduced here today. I was the conductor of second No. 2. I knew that I was to be conductor when I was called. I wouldn't say just when, we were called though, I think, at about 7:10. That is done by the call boy—sometimes he calls you by telephone. I think we were called by a telephone from the caller. I didn't get any instructions as to the calling of the crew, with reference to running the train. That wasn't my business—that was up to the terminal. They probably got their instructions from Fort Dodge." Q. "Is it customary to call a man when he is not needed for the crew?" A. "Well, if they wanted to get the men here to run it back, they would probably call all the men. Sometimes they just dodge them around on this 16-hour proposition and they are liable to split a crew for something. It is up to the officers. We had no order to handle those men. Pelton and Fuhrman were called as the crew that night, besides myself. That was my crew. Pelton had been a brakeman, I should judge, 3 or 4 or 5 years, or something like that, and Fuhrman had been a brakeman about the same length of time. One of those men was a rear brakeman and the other a head brakeman. The duties of a rear brakeman would be to light his lights behind and take care of the caboose, etc. In case of a stop, he would look the train over and go out and flag, if it was necessary. If the train stops between stations in an emergency, the rear brakeman goes back and flags, that is a part of his duty, and the head brakeman goes forward and flags, if it is necessary. The necessity is determined sometimes by the conductor and sometimes by the engineer. As a general thing, the conductor has charge of the train and gives the orders with reference to it. The conductor has the general charge of the train going between stations on the Illinois Central Railroad. He gives the orders to the men on the train. This accident occurred on the 20th of November, 1911, the night I was conductor in charge of section 2. Mr. Pelton and Mr. Fuhrman were my brakemen. I received some orders at Council Bluffs."

The superintendent of the defendant company, Downs, testified as follows:

“A freight crew consists of a conductor and two brakemen with a through freight. A conductor and three brakemen on a local freight. On some trains, a passenger train crew consists of a conductor and one brakeman and on some trains more. On some trains we have a porter. The crew that the second section of No. 2 from Council Bluffs to Fort Dodge had were, in the ordinary course, a freight crew but this night they were on a passenger train. There are regular and signed passenger crews. When one of those men lay off, or when new trains are put on temporarily or special train run, often a freight crew that has been running in freight service runs in the passenger service. Whether or not the whole crew goes to the passenger service, or just enough of the freight crew to make a crew, would depend on certain circumstances. If a freight crew consisting of a conductor and two brakemen arrived at Council Bluffs or Fort Dodge, and the superintendent or proper officials desired to run a second section of a passenger train with a freight crew, and assuming that one conductor and one brakeman would be sufficient for the passenger train, as to what would be done with the extra brakeman would depend upon circumstances. For instance, sometimes he might be used on that crew and, if there was some other services for him to be used for he might be in other services—freight services. Conditions are different. It just depends on the circumstances. The conductor is in charge of the train. He has authority over all members of the crew, but the engineer is equally responsible with the conductor so far as the running of the train, as it affects train rules and their rights; but eliminating the fireman and engineer. The rear brakeman reports to the conductor and the conductor has charge. If I wish to transfer a crew in Council Bluffs that had run down from Fort Dodge to the second section of a different run, we would change one conductor and

his crew to section No. 2. The chief dispatcher at Fort Dodge would issue a call to the yardmaster at Council Bluffs. His call would be an order that causes that crew to take charge of that certain train and take it back. He says to the yardmaster: 'That is the crew that I want on that train,' and the yardmaster carries out those instructions and sees that that crew is called and sees that they are placed in charge of that train and that the train is ready to go. Sometimes there is a record kept of those calls—I do not know whether the boys kept a record in Council Bluffs or not. Those calls are usually transmitted in this way: The chief train dispatcher would say to the yardmaster: 'I want W. S. Emory and his crew' and that is the last of it if Emory is there, and it doesn't need any record."

The foregoing is a sufficient indication of the general nature of the testimony on behalf of plaintiff at this point. We think it is not only quite abundant to support an affirmative finding that the plaintiff was employed by the defendant at that particular time in the operation of such train, but also that it is quite conclusive on the question. He was, therefore, necessarily employed by the defendant in interstate commerce. *Armbruster v. C. R. I. & P. Ry. Co.*, 166 Iowa 155. The fact that only one brakeman is usually necessary for the operation of a passenger train, or that there was no pressing need for more than one brakeman for this particular train, is not a controlling fact. If the plaintiff was ordered by the directing officers of the corporation to the operation of this train as a member of Emory's crew, and if he boarded the train in obedience to such order, we see no room to claim that he was not employed in its operation, whether his duties thereon were many or few. That the defendant so regarded him is indicated by the further fact that it paid him for the run in precisely the same manner that it paid the other members of the crew. We hold, therefore, that the defendant was not entitled to a directed verdict on the ground here considered.

2. The plaintiff rode upon the engine. It is the contention of the appellant that this was done in violation of rule No. 728; that it was clearly contributory negligence, and

2. MASTER AND
SERVANT:
rules: practical construction of: riding on engine.

that it amounted to an assumption of risk by plaintiff, because he knew and appreciated the danger in so riding. The rule in question was as follows:

“No person will be permitted to ride on an engine or in baggage, mail or express cars (except employees in discharge of their duties) without a written order from the superintendent.”

The argument on this point is largely predicated upon the theory that the plaintiff was not employed in the operation of this train. It is also contended that even if he were so employed, he was prohibited by such rule from riding on the engine. It appears practically without dispute that this was the customary place for the head brakeman of a “through freight” to ride, and that this was the customary place where the plaintiff, as head brakeman, rode. He also testified that he was directed by the conductor to “ride ahead,” which meant to ride upon the engine.

It is contended for plaintiff that he was an employee engaged in the discharge of his duties as such, and that the rule had no forbidding application to him. The language of the rule will certainly bear such construction. To our minds, it is the natural construction. The evidence also warrants the statement that such was the practical construction put upon the rule by the defendant and its employees. We think, therefore, that the rule in question presents no impediment to plaintiff’s recovery.

This conclusion renders it unnecessary, also, to consider the many questions raised and argued relating to custom and waiver of rules.

3. Appellant complains of the instruction of the court on the subject of assumption of risk. The point made is that

the defendant pleaded no assumption of risk except that which
 3. APPEAL AND
 ERROR: invit-
 ing instruc-
 tion: estoppel. inhered in the employment, and that such
 plea presented no issue of fact, and that
 the court therefore erred in submitting the
 question to the jury, as though an issue of fact were pre-
 sented. The record in this respect presents a peculiar state.
 The third division of defendant's answer was as follows:

Further answering the defendant says: "That at the time of the accident and long before, the plaintiff was in the employ of the defendant as a brakeman. That his duties were such as were usually incident to such employment upon a railroad train. That at the time of the accident, if engaged, as he claims he was, in the performance of any duty, it was connected with the running of a passenger train where he was familiar with any and all dangers connected therewith. That the accident happened at a time when it was bright moonlight and objects readily distinguishable. That in accepting said employment the plaintiff did so with the knowledge of the dangers naturally incident to his employment, and such other dangers as were obvious and patent, and that recognizing, knowing, and appreciating such dangers the plaintiff placed himself voluntarily upon the engine where his duties did not demand him to be, and in a place where he knew and appreciated and where it was obvious and patent that the position assumed was the most dangerous place upon the train, and realizing, knowing and appreciating such dangers and the unusual danger connected therewith and the unnecessary danger connected therewith, he accepted such employment and assumed the risks that were natural and incident and obvious in said employment, and therefore waived any right to recover by reason of such continuance voluntarily in the employ of the defendant, and assumed all such risks connected therewith."

In stating the issues to the jury, the court stated this purported defense precisely as made in the answer. This was followed by instruction 18, as follows:

“A servant by entering or continuing in the employment of a master without complaint assumes the risks and dangers of the employment which he knows and appreciates and which an ordinarily prudent man would have known and appreciated if placed in his situation; but he does not assume those risks which are not necessarily incident to his employment and which he does not know or the dangers of which he does not appreciate. . . . Now, in this case, it is for you to determine from all the evidence in the case, whether or not plaintiff assumed the risk. If he did, he cannot recover in this case.”

The argument for appellant is that it did not plead assumption of risk in its true sense, but that it pleaded only such assumption of risk as inhered in the contract of employment; that there was, therefore, no issue to be submitted. An examination of this division of defendant's answer, as above quoted, satisfies us that it pleaded no defense whatever, and that it could well have been ignored by the trial court. But the defendant is in no position to complain. Its answer purported to plead assumption of risk as a defense. If there was no intention to plead assumption of risk in its true sense, as a defense, there was no occasion for pleading it at all. *Duffey v. Consolidated Block Coal Co.*, 147 Iowa 225; *Martin v. Light Company*, 131 Iowa 724.

The defendant, however, did not confine its pleading to the assumption of risk incident merely to the contract of employment. It charged further that the plaintiff had assumed the obvious dangers and that he assumed the risk in question, because he knew and appreciated the danger to which he had exposed himself. It will be noted, by comparing the pleading with the instruction above quoted, that the trial court submitted the question to the jury precisely as the defendant pleaded it, and we see no room for complaint by the defendant.

There was another reference to the subject in instruction 7, wherein it was stated that the burden of proof as to assump-

tion of risk was upon the defendant. Appellant contends that this put a burden upon it upon a question not in issue. Whether the danger to which plaintiff was exposed was an obvious one, and whether it was one which he appreciated, was a question upon which the defendant's pleading tendered issue, and the defendant necessarily took the affirmative of the issue. The instruction of the court, therefore, upon this subject was invited by the defendant, and was consistent with defendant's pleading. Furthermore, the defendant requested an instruction upon the subject of assumption of risk, by presenting a requested instruction. We see no material difference between the instruction requested by the defendant and that given by the court, except that the requested instruction contained no reference to the burden of proof.

4. It is urged by appellant that the plaintiff wholly failed to prove the negligence specified in his petition, and that the trial court erred in refusing to direct a verdict for the defendant. The accident which resulted in plaintiff's injury was a head-end collision between the passenger train in question running east and a freight train running west. The accident occurred at about 8:40 P. M., three-fourths of a mile east of Logan. When the passenger train left Council Bluffs at about 8:00 P. M., its orders gave it a clear track to run without stop to Fort Dodge, one hour and twenty minutes late. A few minutes later, the train dispatcher gave an order to a west-bound freight train to meet the passenger train at Logan, and gave such freight train until 8:45 to clear the track. This order was never communicated to the passenger train crew. It could not be communicated except by signals. A proper signal was the display of a red light at Logan for the passenger train.

It is the contention of the defendant that such red light was displayed, and it is also contended that the testimony is conclusive to that effect. On the other hand, it is contended for plaintiff that a green light was displayed at Logan, and

4. APPEAL AND
ERROR: plead-
ing: specifica-
tions of negli-
gence: proving
others.

not a red light. The green light was a signal to proceed. The specifications of negligence charged in the petition are all grounded upon the failure of the defendant, through its train dispatcher, to protect the passenger train against the freight train, either by appropriate orders to the freight train or by appropriate signals to the passenger train. It is the contention of the defendant that the testimony shows conclusively that the accident resulted from the negligence of engineer Haviland on the passenger train in failing to observe the red light, and in failing to see the headlight of the freight train, which was observable for a distance of more than two miles, upon a straight track.

The further contention is made that the plaintiff cannot recover, notwithstanding the negligence of such engineer, because he did not specify such negligence of the engineer as the ground of defendant's negligence. A peculiar situation is presented. The defendant was confessedly negligent; and yet it asks a reversal because it was not negligent in the respect specified by the plaintiff's petition.

It is undoubtedly true that in order to recover, the plaintiff must stand upon the specifications of negligence set forth in his petition. The purpose of requiring such specification is not to spread a net to the plaintiff, but to enable the defendant to know what evidence it has to meet. The gist of the action, nevertheless, is the negligence of the defendant in whatever form, and not any particular specification. The specifications are amendable at any time pending the action. If we were to find that the specifications of negligence pleaded by the plaintiff were not proven, we would still be confronted with the confession and contention of the defendant that, though it was not negligent through its dispatcher, it was negligent through its engineer, whose negligence caused the accident. The effect of a reversal would be to send the plaintiff back to prove the negligence of the defendant through its engineer, a negligence already confessed in the record before us. The situation is exceptional, and it may well be doubted

whether a reversal and a new trial could be justified in such a case.

Turning to the evidence, however, both the plaintiff and Fuhrman, the other brakeman, testified that they observed the light which was displayed at Logan, and that it was the green light, and not the red light. How it appeared to the engineer can only be a matter of inference, because he was killed in the collision. On the other hand, testimony on behalf of the defendant was to the effect that the red light was displayed. Explanation is also offered on behalf of the defendant of a possible mistake by the witnesses for the plaintiff in that they had seen the green light of the Northwestern Railway which crosses at this point, and which admittedly displayed a green light at that time. All that concerns us now

5. **APPEAL AND
ERROR:** verdict:
support in evi-
dence.

is that the testimony on behalf of plaintiff clearly tended to support his specifications of negligence. The trial court confined the jury to the consideration of the specific grounds of negligence charged. The question was, therefore, properly submitted, and the finding of the jury thereon is conclusive.

5. We have already considered the evidence on the question of whether the plaintiff received his injury while he was employed by the defendant in interstate commerce. The ap-

6. **APPEAL AND
ERROR:** instruc-
tions: omis-
sion of fully
established
issue.

pellant complains that the trial court failed to submit this question to the jury; and that if it can be said to be submitted at all, it was so done by contradictory instructions. It must be conceded that the trial court lost sight of this element of the case in the first eleven instructions given. It was omitted from the statement of the issues. The sixth and seventh instructions given were as follows:

(6) "Therefore, gentlemen, for the plaintiff to recover in this action, he must establish by a preponderance of the evidence the following propositions, and if he fails to establish any one of them, he is not entitled to a verdict at your hands. Said propositions are: (1) That the train on which plaintiff was riding was at the time of the accident engaged

in interstate commerce. (2) That the defendant did or omitted to do at least one of the things charged by him as constituting negligence. (3) That in the doing or omitting to do this thing or these things, defendant was in fact guilty of negligence, as negligence is hereinafter defined. (4) That the negligence of the defendant was the proximate cause (as proximate cause is hereinafter defined) of the injury of which the plaintiff complains. (5) That he suffered some damages, and the amount thereof."

(7) "If the plaintiff has established by a preponderance of the evidence each of the foregoing five propositions, he will be entitled to your verdict unless the defendant has established by a preponderance of the evidence, the burden of proof being on it so to do, that the plaintiff assumed the risk, as the same is in these instructions hereinafter explained, of the dangers from which the injuries he received resulted. If the assumption of the risk has been so established by the defendant, the plaintiff cannot recover in this action."

It will be noted that by these instructions the plaintiff was allowed to recover regardless of this element of his case. In instruction 12, however, the trial court defined interstate commerce. Such instruction concluded as follows:

"But in order to bring himself within the protection of the law with regard to employees in interstate commerce, plaintiff must show by preponderance of the evidence that while riding on said train, he was an employee of the railway company, and was acting within the scope of his employment."

The question then presented to us is whether the portion of instruction 12 here quoted sufficiently corrected the oversight of the preceding instructions, or was it a mere contradiction thereof? As already indicated, the fact that plaintiff was employed in interstate commerce was established. Such a question is usually a mixed question of law and fact, and often one more of law than of fact. The facts involved in such a question are usually simple. When they appear

in the record without material dispute, it devolves upon the court to construe the federal act in its application thereto. So in this case, sufficient facts are undisputed to bring the case within the federal act. The jury, therefore, had nothing to do with the question. The court could properly have given a peremptory instruction thereon. The fact that it failed to do so and that in the twelfth instruction it submitted the question to the jury could not be prejudicial to the defendant. The finding of the jury could not have been more adverse to the defendant than the peremptory instruction would have been.

6. It is urged that the verdict was excessive. The verdict was for \$20,000. It was reduced by the trial court to \$14,000. It is urged upon us that this amount is still excessive. The injury was received on November 20, 1911.

7. **DAMAGES : excessive verdict : personal injury.** The trial was had in April, 1913. The plaintiff's injury was caused by his jumping from the engine when the collision was impending. It resulted in an injured knee and an injury to his spine. As a result, he has a permanently stiff knee. He has a curvature of the spine and some paralysis. The vertebræ of his spinal column have been forced out of their normal position so that they pinch the spinal cord and impinge upon the spinal nerves. He is unable to walk without crutches. He is suffering from serious nervous disorders as a result of injuries to his spine. His earning capacity is wholly destroyed. Prior to his injury, he was earning from \$100 to \$145 per month. His helpless condition is probably permanent. Upon this showing, we cannot say that the amount of the judgment is excessive.

7. Sixty-one errors are assigned. We cannot consider them all in detail. The foregoing comprise all the alleged errors which are dealt with in the brief and upon which the emphasis of the appeal is laid. We have considered all the errors alleged and find nothing prejudicial to the appellant.

The judgment below must be, therefore,—*Affirmed*.

LADD, C. J., WEAVER and PRESTON, JJ., concur.

S. B. STONEROOK, Appellant, v. LOIS J. WISNER et al., Appellees.

GUARDIAN AND WARD: Sales Under Court Order—Unknown Easement—Caveat Emptor. *Caveat emptor* doctrine does not apply to sales by guardians under order of court.

PRINCIPLE APPLIED: A guardian of a minor, claiming his ward was the owner of a certain lot, obtained an order of court authorizing sale. Plaintiff bought in reliance on full ownership in the ward. After considerable work had been done in erecting a building, it was discovered that a 12-foot easement across one end of the lot was held by the public for a street. *Held*, such sales are in a sense by the court, or at least are under the control of the court, and that common honesty should and must prevail by granting an abatement on unpaid purchase price.

Appeal from Hardin District Court.—HON. C. G. LEE, Judge.

WEDNESDAY, JUNE 30, 1915.

ACTION in equity for abatement in purchase price of a certain town lot. Demurrer to petition sustained and plaintiff appeals.—*Reversed*.

F. M. Williams, for appellant.

C. A. Rogers and *George W. Ward*, for appellees.

LADD, J.—Briefly stated, the petition makes a case as follows: That in August, 1904, the guardian of Lois J. Wisner, a minor, undertook to sell to the plaintiff the East 1/2 of Lot 8 in Block 24 in the town of Iowa Falls, Iowa; that plaintiff made such purchase for the purpose of improving the same by erecting thereon a permanent business building to cover its entire length of 132 feet; that said guardian, claiming his ward to be the owner of all said prop-

GUARDIAN AND
WARD: sales
under court
order: un-
known ease-
ment: *caveat
emptor*.

erty, obtained an order of court authorizing him to sell the same, and plaintiff, believing and relying thereon, made the purchase at the agreed price of \$4,800 and proceeded to expend money in considerable sums in excavating the basement story and constructing the foundations of the new building, when it was discovered that 12 feet of the rear end of said lot had been appropriated by or dedicated to the public as an alley or public way, and that the need made by said guardian conveyed to plaintiff the title to but 120 feet in depth, instead of 132 feet. It is further alleged that the guardian and plaintiff entered into said contract of purchase under a mutual mistake as to the title of the ward in said property; that neither of them knew or believed that any part of said lot had been acquired by the public, and entered into the agreement of sale and the subsequent conveyance in good faith, believing that the grantor was conveying and the grantee receiving the absolute title to the very property therein described. It is further alleged that said mistake was not discovered until the work of constructing the building had progressed to a considerable extent, putting plaintiff to much trouble and expense in changing his building plans, and that, under the circumstances, it was impracticable to put all parties *in statu quo* by a rescission of the purchase. He avers that the lot as actually acquired by him was worth at least \$1,200 less than it would have been had he been given title to its entire area; that as a matter of fact, \$400 of the agreed purchase price is still unpaid, and he asks the court to decree an abatement from the purchase price proportionate to the loss in the area of said lot, and that the same be applied in satisfaction or cancellation of the unpaid balance of said price as of the date of such sale. The demurrer denies the sufficiency of the petition to state a cause of action, because it appears that said conveyance was made by the guardian of a minor under leave and order of court; that the rule of *caveat emptor* applies to purchases so made, and neither law nor equity affords him any remedy for loss or damage so

sustained. The demurrer was sustained, and plaintiff electing to stand upon his petition, it was ordered dismissed, and he appeals.

The ruling of the trial court evidently proceeded on the theory that the doctrine of *caveat emptor* should be applied. That doctrine was applied in *Holtzinger v. Edwards*, 51 Iowa 383, where the purchase was under an execution and there was a prior judgment lien which the purchaser failed to discharge, the court holding that, having taken his chances in buying, the purchaser was not entitled to relief. In *Hale v. Marquette*, 69 Iowa 376, the administrator sold certain land, the plaintiff being the purchaser, and it was claimed that certain necessary parties were not given notice of the proceedings, and that therein there was a breach of the condition in the deed that the administrator "do covenant . . . that in conducting said sale I have complied with all the requirements of the law and of said court." It was there conceded that the doctrine of *caveat emptor* applies in the absence of fraud, and the breach of the covenant was relied on. The court held that the administrator was without power to bind the estate by any covenants in a deed; that he might only sell such title as the deceased debtor had. In *Ritter v. Henshaw*, 7 Iowa 97, a lot was sold under execution, and upon its being shown that a mortgage constituting a prior lien had been foreclosed and the lot sold thereunder, plaintiff acquired no title whatever under the sale. It was set aside, the court saying "the doctrine of *caveat emptor* has its legitimate force in precluding any idea of a warranty by the defendant in execution, or by the sheriff; but in all the numerous cases, it is not viewed as having an application to bar the creditor or the purchaser from his appropriate relief." Relief in event of a purchaser at sheriff's sale of real estate, on which the judgment is not a lien at the time of the levy, unknown to the purchaser, is provided for in Sec. 4034 of the Code. See also *Rosenberger v. Hawker*, 127 Iowa 521.

In *Crawford v. Foreman*, 127 Iowa 661, the court held

the doctrine of *caveat emptor* applicable where the purchaser made his bid with full knowledge of the facts. In no case in this state has the doctrine been extended to guardian sales. Though without much consideration as to whether applicable, it has been applied in other states in cases too numerous for citation. This has been on the theory that the officer tenders for sale the title only which his ward has to dispose of, and that the purchaser must ascertain for himself what this is. Another reason has also been given, and it is that, from the nature of the transaction, there is no one to indemnify the purchaser for any loss he may sustain. *The Monte Allegre*, 9 Wheaton (U. S.) 616.

Ordinarily the doctrine is applicable only where there has been a mistake, for if this were not true there would not likely have been a sale, and it is a little difficult to understand how there could have been a mutual mistake, such as alleged in the petition herein, when neither party had any knowledge of the existence of the easement, and the contract contained no reference thereto, and was not intended to have done so. As indicated in *Ritter v. Henshaw, supra*, there is ample reason for not permitting this guardian to bind his ward with any covenant in the conveyance or elsewhere, but there is every reason for insisting that the guardian, in representing his ward, act honestly with those with whom he deals, and that he convey precisely what he undertakes to sell, and that, if he shall fail or neglect to do so, the court shall see to it that no advantage be taken thereof. In New York, the rule of *caveat emptor* is not applied to judicial sales, the purchaser having the right to demand a marketable title, free from reasonable doubt as to its validity. There he bids on the assurance that there are no undisclosed defects in the title, and, of course, the consideration naturally is regulated by this implied condition. *Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726. See note to *Peake v. Renwick*, 33 L. R. A. (N. S.) 409. The same rule seems to obtain in Maine. *Dresser v. Kronberg*, 36 L. R. A. (N. S.) 1218. There is a conflict of authority as

to whether the doctrine applies to sales under decrees in equity, but the great weight of authority is to the effect, as stated by Mr. Freeman in his note to *Burns v. Hamilton's Heirs*, 70 Am. D. 570, 575, that "In equity sales, the purchaser is entitled to receive a title free from equities and incumbrances of which he had no notice, and if by the sale he will not receive such title, he will not, upon his making objection, be compelled to complete the purchase, but will be released therefrom, unless title be made good or other just relief awarded." See cases collected in note to *Peake v. Renwick*, 33 L. R. A. (N. S.) 409; *Hunting v. Walter*, 33 Md. 60; *Bolivar v. Zeigler*, 9 S. C. 287. Contra, *McManus v. Keith*, 49 Ill. 388; *Owsley v. Heirs of Smith*, 14 Mo. 153.

It seems that the doctrine is not extended to mistakes in the quantity of land where sold by the acre, even though strictly applied to defects in title. *Singleton v. Castleman*, 28 L. R. A. (N. S.) (W. Va.) 393. There is a decided tendency in the decisions to avoid conclusions in the hard application of the doctrine in the early cases, and to apply, where possible, the more just principles which obtain in sales under decrees in equity. The reason ordinarily stated for not applying the doctrine in equity cases is that the court in a sense is the seller and controls the sale up to the very time the conveyance is confirmed. See *Boorum v. Tucker*, 51 N. J. Eq. 135. See also cases collected in notes to *Mount v. Brown*, 69 Am. D. (Miss.) 362, 368, and *Burns v. Hamilton*, 70 Am. D. 570, 574. The court in ordering a sale of land by the guardian exercises complete control over its officer in making the sale, in determining the terms and the matter of its confirmation and the reasons for declaring the doctrine of *caveat emptor* not applicable to sales under equity decrees are precisely as persuasive when applied to guardian sales under the orders of court. A sale under partition proceedings is but a mode by which the parties themselves, through a statutory method, proceed to dispose of property for division of the proceeds among themselves, and this being so, the purchaser

has the same equity against being compelled to go on with his purchase as if the purchase had been made by the parties outside of court, and for this reason, if the purchaser discovers the defect in time to save himself, he is not without remedy. *Smith v. Britton*, 38 N. C. 347, 42 Am. D. 175; *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403. In the latter case, it is said that "Although the sale in this case was made by the sheriff, yet it was not a compulsory sale under process of execution, where the rule of *caveat emptor* does apply, but a sale for partition at the instance of the parties, and must be governed by the same process as applied to such sales when made by the commissioner in equity."

The guardian represents the interest of the individual ward. The application for the sale of land is for the interest and advantage of such individual, and the court can properly direct a sale for no other purpose, and, in so doing and fixing the terms, it exercises complete control over its officer, and the sale, after made, may be rejected by the court or confirmed at its election. It seems to be as completely under the control of the court as sales under decrees in equity, and precisely the same reasons obtain for not applying thereto the doctrine of *caveat emptor*. It may be that, where *caveat emptor* applies to sales under execution, and possibly to those by an administrator, on the ground also that there is no one to indemnify the purchaser for any loss he may have sustained; but this is not true with reference to the sale of land owned by one under guardianship. In the latter case, there is always some one who, in good conscience, should indemnify the purchaser when the sale is made under such circumstances as shall indicate that the purchase price in whole or in part has been received for something sold which did not belong to the ward. If it can be said that, in such a case, the ward, through his guardian, should be relieved from restitution when demanded, when under like circumstances an adult would be required to return the purchase money or a pro rata share thereof, we have failed to discover the reason therefor. While

the guardian should not be held to warrant the title of land sold in behalf of his ward, he should be required by the court, in the interest of common honesty, to convey to the purchaser what, in behalf of the ward, he undertakes to sell, and on failure to do so, should be compelled to make proper reparation. Here, according to the allegations of the petition, the lot was sold as an entirety, the easement was alike unknown to the guardian and to the purchaser, and neither negotiated with reference thereto. It was not disclosed in the records of which the abstract was an exemplification, and to permit the ward to profit by the sale of the 12 feet which had previously been appropriated as an easement would be inconsistent with fair dealing and encourage dishonesty on the part of the ward. In a sense, the court, as under decrees in equity, is the seller, and should see to it that the purchaser receives precisely what its officer, the guardian, has bargained, especially when the defect has been discovered before the sale has been confirmed, or, as in this case, before the entire purchase price has been paid. In our opinion, the doctrine of *caveat emptor* should not be extended to sales by guardians under the order of court, and on that ground the demurrer should have been overruled.

The decree of the district court is—*Reversed*.

All the Justices concur.

B. I. WICK, Appellee, v. MARTIN BECK, Appellant.

DIVORCE: Liability of Husband for Legal Services for Wife—Necessity for Protecting Wife. The liability of a husband, in an independent action, for legal services rendered for the wife in divorce proceedings rests essentially on the fact of a "necessity for the protection of the wife." Unless this "necessity" is made to appear in some manner, no recovery can be had against the husband. It is not "necessary" for the protection of a wife that she be defended against charges of misconduct which are true.

PRINCIPLE APPLIED: Independent action against a husband for legal services rendered the wife in divorce action. Cause ruled on demurrer to petition containing following allegations:

“That the wife brought action for divorce; that the husband filed answer and cross-petition; (the grounds alleged by the parties do not appear, except that those alleged by the husband were ‘such as to injure the name and standing of the wife’); that, in addition to the services performed in the bringing of her action, the attorney prepared and filed, at the wife’s request, a motion asking that the cross-petition be made more specific; that he likewise prepared for her an answer to the cross-petition, rendered consultation services and looked up her evidence; that thereupon, the wife, without the knowledge of her attorney, withdrew her appearance, and a divorce was granted to the husband; that the said attorney acted in good faith in bringing the action and performing the services for the wife; that the wife had a good cause and sufficient grounds for a divorce from her husband; that said services were necessary for the protection of the good name and reputation of the wife and to procure for her from the husband means of support and maintenance, said husband having refused to provide her with the necessaries of life.”

The lower court ruled that plaintiff (the attorney) could not recover of the husband for the services rendered in the wife’s original action, but could recover for the services rendered with respect to the cross-petition. The latter services alone were involved in the appeal. *Held*, the petition not only (a) did not reveal any “necessity for the protection of the wife” but (b) revealed the contrary.

Note: The truth of the charges against the wife, evidenced (a) by her instant withdrawal from the case after they were filed, and (b) by the granting of the decree thereon to the husband, is the deciding factor in the construction placed on the petition.

EVANS, J., specially concurs. DEEMER, C. J., WEAVER and SALINGER, JJ., dissent.

Appeal from Superior Court of Cedar Rapids.—HON. C. B. ROBBINS, Judge.

WEDNESDAY, JULY 28, 1915.

ACTION by an attorney to recover for legal services rendered the defendant’s wife in an action for a divorce brought

by the husband against the wife, in which the husband established the grounds alleged for a divorce to be true. From a judgment in favor of the plaintiff for the value of such services, defendant appeals.—*Reversed*.

M. P. Cahill and Lewis Heins, for appellee.

Crosby & Fordyce, for appellant.

GAYNOR, J.—This is an action to recover for legal services rendered defendant's wife in an action commenced by her against her husband. The petition alleges:

1. DIVORCE:
liability of
husband for
legal services
for wife: ne-
cessity for
protecting
wife.

“That on or about August 14, 1912, this plaintiff was consulted in a professional capacity by Ellen F. Beck with reference to the securing of a divorce for the said Ellen F.

Beck from this said defendant. That thereafter, and on or about the 22d day of August, 1912, this plaintiff brought an action for divorce for the said Ellen F. Beck, and against the said Martin Beck, in the district court of Linn county, Iowa. That thereafter and on or about the first day of September, 1912, there was filed by the defendant in said divorce action, an answer and cross-petition; that afterward, on or about September 5, 1912, there was prepared and filed a motion to make more specific, directed against the answer and cross-petition so filed, and thereafter this plaintiff prepared for the said Ellen F. Beck, and at her instance, an answer to the cross-petition of the said Martin Beck. That afterwards the said Ellen F. Beck withdrew her appearance in the said divorce action, as this plaintiff is now informed, but of which fact he had no knowledge at said time, and a decree of divorce was rendered in favor of the defendant on his said cross-petition. That the allegations of the said cross-petition were such as to injure the name and standing of the plaintiff, Ellen Beck, in said divorce action, and that the plaintiff herein acted in good faith in bringing the said action for divorce for

the said Ellen F. Beck; was then of the belief, and now states the fact to be that the said Ellen F. Beck had a good cause and sufficient grounds for a divorce from her husband, the defendant herein; that all professional services, as above set out, were rendered by this plaintiff in good faith and upon the request, and at the instance of the then wife of the defendant herein; that said services were necessary for the protection of the good name and reputation of the said Ellen F. Beck, and to procure for her from this defendant means of support and maintenance, said defendant having refused to provide her with the necessaries of life, and having notified grocers and others dealing in necessaries to refuse to his said wife the right to purchase on his credit.

“That the services rendered in behalf of said Ellen F. Beck were reasonably of the value of \$200, and a more particular statement of the nature of the services performed and the value thereof, is the following, to wit:

August 14, 1912, to consultation and retainer.....	\$25.00
To office consultation August 15, 16, 17.....	30.00
August 21, to drawing petition.....	25.00
September 3, reading cross-petition and preparing motion to make more specific.....	40.00
September 4, 5, office consultation.....	20.00
To looking up evidence, consultation, preparing answer to cross-petition	60.00

“That demand has been made by this plaintiff upon the said defendant, Martin Beck, and also upon the said Ellen F. Beck, but that neither party has paid the said sum or any part thereof, and that the total amount thereof is due and unpaid, and that the said claim for services is the property of this plaintiff. Wherefore, plaintiff asks judgment according to the prayer of his original petition against the said Martin Beck in the sum of \$200, with interest at the rate of six per cent. from December 24, 1913, and for his costs and disbursements in this action.”

The defendant filed to plaintiff's petition the following demurrer:

(1) That the allegations of the petition do not entitle the plaintiff to the relief demanded.

(2) That it is shown by said petition that the services claimed for were performed at the instance of Ellen F. Beck, and not at the instance of the husband.

(3) That the petition shows that it has been adjudicated that Ellen F. Beck had no valid cause for divorce.

(4) That the petition further shows that the allegations of the cross-petition of Martin Beck were true, and that Martin Beck was entitled to a divorce.

(5) That the petition shows affirmatively that the services rendered were not necessary, but, on the contrary, were unnecessary.

The demurrer being submitted, the court sustained it as to the first three items of plaintiff's petition, and overruled it as to the last three items, thereby holding that the plaintiff could not recover for services rendered in the action for a divorce commenced by the plaintiff, but could recover for services rendered in the defense of the cross-petition. The defendant elected to stand upon the demurrer and judgment was rendered for the plaintiff against the defendant, for the amount of the last three items, to wit, \$120. Defendant alone appeals.

The question here is whether or not, under the allegations of this petition, the plaintiff is entitled to recover for services rendered in the defense of the cross-petition. The petition filed by the plaintiff does not state on what grounds Mrs. Beck sought a divorce from her husband. The only allegation is that she filed a petition in which she asked a divorce. Upon the filing of such petition, the defendant appeared and filed an answer and cross-petition, in which he asked affirmative relief against the plaintiff. The petition does not show the grounds on which defendant sought in his cross-petition to obtain a divorce from his wife. It appears that the attor-

ney for Mrs. Beck filed a motion to require the cross-petition to be made more specific. It does not appear whether this motion was sustained or overruled. After the filing of such motion, the plaintiff, as attorney for Mrs. Beck, prepared an answer to the cross-petition, but it does not appear that this was filed. Thereupon, Mrs. Beck withdrew her appearance in the divorce action without consulting the plaintiff herein, and a decree of divorce was rendered against her upon defendant's cross-petition. As to the right of the plaintiff to recover for services rendered Mrs. Beck, in the original proceeding commenced by her, we are not concerned, for the reason that the plaintiff has not appealed, and the judgment of the court, therefore, stands as a verity against his right to so recover. The only question for our consideration is whether or not the plaintiff is, under the showing made, entitled to recover for the services rendered in defense of the cross-petition.

The plaintiff in this suit does not state what the allegations were on which the defendant founded his right to a divorce on the cross-petition. He assumes to say, and gives it as his opinion, that the allegations were such as to injure the name and standing of Ellen Beck; that he rendered the services at her request; that the services were rendered in good faith; that they were necessary for the protection of the good name and reputation of the wife. The further allegations that it was necessary to procure for her the means of support and maintenance, that the defendant had refused to provide his wife with the necessaries of life, and had notified grocers and others to refuse his wife credit, relate to the necessity for commencing the original proceeding, and so avail the plaintiff nothing here.

But two questions are presented on this appeal: First, whether, under the facts stated, the lower court should have allowed the recovery against the defendant for legal services furnished, under the facts stated in the petition which are admitted by the demurrer; second, whether appellee's peti-

tion is sufficient in its statements of fact to constitute a good cause of action.

The right of a wife to employ counsel at the expense of her husband, in the prosecution of a suit for divorce against him, has been before this court for consideration in many cases. In *Johnson v. Williams*, 3 G. Greene, 97, it was squarely held that a husband is not liable by mere implication of law to an attorney for services rendered to his wife in obtaining a divorce. It was there distinctly held that such services were not, *in and of themselves*, in contemplation of law, the necessities which the marital relation bound the husband to furnish. At that time, divorce cases were triable to a jury, and the court instructed the jury in the trial of the cause that the defendant was not liable for professional services rendered to the wife of the defendant in procuring a divorce and alimony, if such divorce and alimony are obtained, unless he was employed by the defendant, either in person or agent, or unless the defendant promised to pay, or unless he was ordered to pay for such services by the court. This instruction was approved by this court, and the court said: "Without an expressed or implied promise on the part of the husband to pay the debts of the wife, he is only bound for necessities."

In law, the term "necessaries" is understood to mean not only articles which are of absolute necessity, but also such things as are suitable to the fortune and condition of the person to whom they are supplied. The court then propounded this question: "Are the expenses incurred in carrying on a lawsuit for divorce necessities, according to the technical meaning of the word?" and answered the question by saying, "We have not been able to find an author or an adjudicated case that regards the expenses of such suit in the light of necessities."

At common law, the husband was bound to furnish the wife with those things which were reasonably suitable and necessary to her fortune and station in life. Out of this duty grew the right of the wife to pledge the credit of the

husband for these necessary things, whenever he failed to make provision for her in that respect. Out of the duty grew the obligation of the husband. Out of the obligation grew the right of the wife to pledge the credit of the husband for necessities. Beyond them, the wife had no right to pledge the credit of the husband. In *Porter v. Briggs*, 38 Iowa 166, the question was again before this court. The opinion was written by Judge Beck. On rehearing and further argument, a supplemental opinion was written by Judge Day. In this case, the attorneys sought to recover for services rendered to the wife in defending her against an action brought by the husband for divorce on the ground of adultery. It was there held that the services rendered were necessary to establish the wife's innocence of the crime. The same rule involving the duty of the husband to furnish the wife with necessities is here recognized. The difference in the pronouncement in this case and the *Johnson case, supra*, if any difference there is, lies in the facts of the case. The *Porter case* is distinguished from the *Johnson case, supra*, in that it was not shown in that case that the services rendered were necessary for the wife's protection. This *Porter case* rests the entire decision upon the thought that an attorney may recover for services rendered in such case, where it is shown that the services were *necessary* for the *protection* of the *rights* of the *wife*. It is apparent from all the reasoning that this case rests solely upon the finding that the services of counsel were necessary for the protection of the rights of the wife. Judge Day, in the rehearing, said: "That inasmuch as ordinarily the husband possesses and controls their joint earnings, and the wife, without pecuniary means, would be utterly powerless in litigation with the husband, the law, from a sense of propriety and justice, implies a promise of the husband to pay the fees of an attorney *necessary* to the protection of the interests of the wife."

It follows from the reasoning that it must appear that the services were necessary for the protection of the wife,

in order to justify recovery against the husband. The mere fact that a wife institutes a suit against her husband does not, in and of itself, show that it was necessary to do so to protect her rights. Neither does the mere fact that she defends against a suit brought by the husband against her show that it was necessary to do so in order to protect any right the wife had that was involved in the suit. In this case, it does not appear that any defense was interposed by the wife. The charges are "for reading the cross-petition and preparing motion." The record does not show that an answer was ever filed in the cause, or that any defense was made, or that she had any defense to the charges made in the cross-petition. Even in the chancery court, the allowance of suit money is largely under the control and discretion of the trial court. She is entitled to an allowance when it is shown that such allowance is necessary for the prosecution or defense of her suit. In granting temporary alimony, the court cannot prejudice the merits of the controversy.

Sec. 3177 of the Code provides: "The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action."

Sec. 3179 provides: "In making such orders, the court or judge shall take into consideration the age and sex of the plaintiff, the physical and pecuniary condition of the parties, and such other matters as are pertinent, which may be shown by affidavits, in addition to the pleadings or otherwise, as the court or judge may direct."

It has been held that it is not necessary, to establish the right to suit money, that the application be made to the chancery court in the first place. Where the services secured are *necessary* for the protection of the wife, she may pledge the credit of the husband to that end. The question was again before the court in *Preston v. Johnson*, 65 Iowa 285. In this case, the amount in controversy being \$100, it was

submitted to this court for its determination upon the following question: "In an action at law against a husband on an implied promise to pay for professional services rendered for his wife in an action by her for divorce, does the necessity for such services, or the implied promise therefrom by the husband to pay for the same arise when the verified allegation of the wife, with sufficient corroborating testimony of others, would, without conflicting testimony, entitle the wife to a divorce; or is it required, to establish such necessity for professional services to raise an implied promise, that the truth of the allegations must be established by a preponderance of the evidence?" The court answered the question by saying, "We think, conceding the facts stated in the question propounded to be true, that a prima-facie case for divorce would be made out which would justify an attorney in instituting action. The necessity for his services would then arise."

This case, too, recognizes that it must appear that it was necessary for the wife's protection that the suit be instituted, in order that recovery may be had for legal services. It appears that, in this case, the wife brought the action for a divorce. The ground upon which she predicated the right does not appear in the opinion. The opinion, however, states that the action was dismissed by the parties thereto. It does not appear on what grounds, or for what reason, but the opinion does show that the action was instituted in good faith, for the purpose of obtaining a divorce, and we assume that the allegations of the petition showed a right to a divorce if proven, and that, after the cause had been commenced and the services rendered by the attorney, the action was dismissed by the consent of both parties. While this case does not deal with the subject fully, we think it is in line with the thought expressed in the other cases to which reference has been made.

Where an action has been instituted by the wife to obtain a divorce and she is successful, that establishes not only the

right to maintain the action, but the necessity for it. A divorce cannot be granted unless the statutory facts exist upon which the right to a divorce may be predicated. The granting of a divorce establishes the existence of these facts, and the right of the plaintiff to the relief prayed for. The fact that services were rendered by an attorney in establishing this right shows not only that they were rendered for the wife, but that they were rendered in the enforcement of a legal right of the wife against the husband, and that the employment of such counsel was necessary to the securing of the right, and this conclusion rests upon the doctrine laid down by Judge Day in his opinion on rehearing in the *Porter case*, in which he says that "as the husband possesses and controls their joint earnings, and the wife, without pecuniary means, would be utterly powerless in a litigation with the husband, the law, from a sense of propriety and justice, implies a promise on the part of the husband to pay the fees of the attorneys *necessary* to the protection of the interests of the wife."

In *Sherwin v. Maben*, 78 Iowa 467, dealing with this same question, this court, after reviewing the prior cases, reached the conclusion that where a wife commences and prosecutes an action for divorce against the husband on false grounds or accusations, and where the suit is not necessary for the protection of the wife, her husband is not liable for attorney's fees. In this case, it was said, after discussing the cases of *Porter v. Briggs* and *Johnson v. Williams*, *supra*, and especially referring to the *Porter case*: "The holding of the court does not seem to have been based upon any absolute right of the wife to recover because of services rendered for her in a divorce proceeding, but because she was placed in a position where protection was necessary." It was further said, in substance, that in that case the husband sought a divorce from the wife and charged her with adultery. On the trial, her innocence was established, and the court said: "The holding in effect was that where a husband thus attempts to blast the reputation and happiness of his wife,

the expenses for her protection are chargeable against his estate as necessities''; and again it is said in that case (meaning the *Porter case*) that where the action is not necessary for the wife's protection, the husband is not liable. The court further said: "In the case at bar, it does not appear that the grounds of the wife's complaints were true, or the expenses necessary. We think the rule announced in *Johnson v. Williams* is not overruled by the case of *Porter v. Briggs*."

Further commenting on the case of *Preston v. Johnson*, *supra*, this court said that the point in that case is that the necessity for professional services may be determined from the verified allegations of the wife, with corroborating testimony uncontradicted, and in a trial to recover for the services, the attorney need not show that the wife was in fact entitled to a divorce. The decision goes merely to the question of how a certain fact may be established.

Wald v. Wald, 124 Iowa 183, was an action for a divorce on the ground of habitual drunkenness. There was a decree denying the divorce. No order for suit money was made until after a trial upon the merits and the judgment that the plaintiff was not entitled to a divorce. This court said: "The court then had no power to make the allowance under the facts presented in the case." We assume that this holding was upon the theory that the judgment against the plaintiff conclusively established that she was not entitled to a divorce, and that there was no necessity for her commencing the action and the services of the attorneys could not be deemed necessities for which she could pledge the credit of her husband, or which she could require him to furnish.

Gordon v. Brackey, 143 Iowa 102, involved the liability of a husband for wife's attorney's fees in an action for divorce. It appears that the wife brought an action against her husband for divorce on the ground of cruel and inhuman treatment endangering her life; that proceedings were instituted, necessary pleadings prepared, and then, upon the solicitation and request of the husband, the wife dismissed the action.

The allegation of the plaintiff in the suit for wife's attorney's fees was that he acted in good faith in bringing the suit; that he then believed, and now charged the fact to be, that their client had a good cause of action and a sufficient ground for a divorce from the husband. A demurrer was interposed to the petition, demurrer was overruled and appeal taken, and upon a hearing in this court, the case was reversed. The contention on the appeal was that, if the wife has in fact a good ground for divorce, her counsel may hold her husband liable for services, even though the divorce proceedings were dismissed, and the divorce not granted. This court said: "But we do not think this can be allowed. To hold to such a rule would be to say that, after an estranged husband and wife have become reconciled to each other and settled all their domestic difficulties, a third party may put the merits of their former family strife in issue, and ask a jury to say the wife was entitled to a divorce which was never granted. Such a proceeding is against the policy of the law, and ought not to be tolerated. None of the authorities cited by appellant go to this extent, and we are not disposed to establish such a precedent."

If we assume that the allegations of plaintiff's petition above set out were sufficient, in and of themselves, to show that the wife was entitled to a divorce from the husband on the ground of cruel and inhuman treatment, and that the attorney acted in good faith in bringing the suit, and that at the time the suit was brought the wife had a good cause of action for a divorce, and sufficient ground for a divorce, we think this case is inconsistent with the rule laid down in *Preston v. Johnson, supra*, for it seems to be settled in the *Johnson case* that, even though the case is dismissed, if the action was brought in good faith by the attorney for the wife, and the wife at the time had good ground for divorce from the husband, the necessity for the services existed, and, the action being brought upon just grounds, the right of the

attorney to compensation for services would not be defeated by a subsequent dismissal of the case.

Stockman & Hamilton v. Whitmore, 140 Iowa 378, was an action to recover for services rendered the wife in an effort to procure a divorce. The grounds for the divorce were cruel and inhuman treatment. After trial on the merits, plaintiff's petition was dismissed. An action was then instituted to recover for services rendered the wife in the action. The court said: "The decree of the court was an adjudication that the wife was not entitled to a divorce. It was conclusive on both the plaintiff to the suit and her attorneys that she had no grounds for a divorce." It appears that in this case, the attorneys, in order to bring their case within the rule, alleged that on behalf of the plaintiff they had appealed the case to the Supreme Court, and that if it had been prosecuted in the Supreme Court and not dismissed, they would have procured a reversal. The court held that this allegation did not avail them; that the demurrer only admitted what was well pleaded, and, in effect, held that such allegation was a mere conclusion of the pleader, a mere assumption that was not capable of proof under any rule, and it was, therefore, not admitted by the demurrer, and it was held that the attorneys could not recover.

Appellant relies mainly on *Read v. Dickinson*, 151 Iowa 369. This was an action in which the attorneys bringing the action were employed by a wife to prosecute an action for separate maintenance. After the commencement of this action by the wife, defendant filed a cross-petition for divorce on the grounds of cruel and inhuman treatment. The issues were never tried. The parties jointly dismissed the action. The attorneys brought suit to recover for services rendered in defending against the cross-petition for divorce. A demurrer was filed to the petition and sustained, and on appeal was reversed. The court said in substance: The fact that the parties jointly dismissed the action can make no difference with the plaintiff's right to recover. The charges had been

made against the wife and made public. She had a right to defend against them and to employ counsel for that purpose. The very fact of dismissal of the cross-petition is evidence of its want of merit. The holding of this case, therefore, is that where an action is commenced against a wife, charging her with adultery, cruel and inhuman treatment, and drunkenness, or any other charge that affects the good name, reputation or integrity of the wife, she may defend against such charges, *if wrongfully brought*, and that, although it was never tried and determined that these charges were not true, yet the fact that the plaintiff dismissed the case is evidence of the want of merit. The presumption is in favor of innocence. The presumption is that the wife was not guilty of these heinous things. The charge was made against her. The presumption of innocence obtaining, she had a right to meet and refute the charges. To this end, she had a right to employ counsel, and the mere dismissal of the case should not embarrass her action in so doing. After dismissal, the presumption of innocence still obtains. The dismissal was, in fact, an admission of the want of merit in the husband's claim. It may be that the case was dismissed because of the defense interposed. It follows, therefore, that upon the filing of the petition it became necessary for her protection that a defense be made, and, being necessary, the right to pledge her husband's credit in securing this grew out of the relationship of husband and wife.

Underlying all these decisions is the thought that, in proceedings for a divorce, whether commenced by or against the wife, it must appear that the prosecution or defense was necessary for her protection before the husband can be made liable for the services of the attorney in the cause. Any other rule would lead to serious complications and embarrassments, and would not be just or equitable between the parties. To hold that a wife can commence a suit against her husband for a divorce, without legal grounds therefor, and compel the husband to pay attorneys' fees incurred by her

in the prosecution of the suit, whether she afterwards dismiss the suit, or whether it is adjudged against her, would not be consonant with reason or the policy upon which the rule of necessities rests. Or to permit her to make a defense at the expense of the husband where no defense exists, and where, by reason of the absence of defense, no necessity therefor exists, would be to permit her, out of malice or caprice, to involve the husband in large expense with no corresponding good to the wife, and without necessity therefor. Where she prosecutes or defends, the judgment entered is conclusive as to the existence or nonexistence of the facts upon which the suit is predicated, or the defense rests, and her failure to establish her claim, or a failure of the attorney in the suit for attorney's fees to show the existence of just cause and necessity for the suit or defense, defeats his right to recover. If the wife pleases to indulge in this sort of pastime, she must do so at her own expense. She cannot pledge the credit of her husband to that end.

While this court is committed to the doctrine that an attorney employed by a wife in good faith to prosecute a suit for divorce, where it is shown that the necessity for the suit in the interest of the wife exists, may recover on the grounds that the husband is liable for necessities furnished the wife, and while she may, when sued for a divorce, defend, where it is shown that it is necessary to do so for her protection, we think the rule ought not to be extended beyond the holding now made.

The holding, then, is that, to entitle an attorney to recover for services rendered the wife in divorce proceedings, it must appear that such services were necessary for the protection of the wife.

Courts are not agreed upon this question. There is conflict among the authorities on the primary question of the husband's liability for counsel fees incurred by a wife in proceedings for a divorce, whether she be plaintiff or defendant. The following cases hold that there is no liability, and hold

this without qualification that, even on the ground of necessities, if such a necessity exists, there is no liability. *Pearson v. Darrington*, 32 Ala. 227; *Dow v. Eyster*, 79 Ill. 254; *McCullough v. Robinson*, 2 Ind. 630 (Carter's Reports); *Yeiser v. Lowe*, 50 Neb. 310, 69 N. W. 847; *Morrison v. Holt*, 42 N. H. 478; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. D. 695. In this last case it was said:

“The husband is liable for necessities furnished his wife, under such circumstances that it may be presumed he would have consented; but this usually means necessary meat, drink, clothing, medicine, etc. When he turns her out of doors, without fault on her part, or she is compelled to abandon his house on account of his cruelty, she carries with her a credit for such necessary articles as may be essential to her maintenance and support and everything necessary for her safety and preservation. For this purpose, legal assistance has been deemed, in some cases, to come within the meaning of necessities, for which the husband is liable. To exhibit articles of peace against him, to lay him under bonds to keep the peace towards her, is necessary for her personal security, to protect her from personal violence. This was the decision of Lord Ellenborough in the case of *Shepherd v. Mackoul*, 3 Camp. 326. When the wife was compelled to institute proceedings against him in law and equity, to compel him to furnish her with support and maintenance, the legal assistance furnished was deemed necessary, for which the husband was made liable. . . . In all such cases, it is for the jury to determine whether her treatment was such as to justify any person in furnishing her with support or legal assistance contrary to the wishes of the husband. . . . But to dissolve the bonds of matrimony between them on her request, or to resist his petition for that purpose, cannot be considered as necessary for her safety or preservation so as to entitle her to procure professional assistance therefor, on his credit and at his cost. No case is found where this was ever attempted.”

See *Isbell v. Weiss*, 60 Mo. App. 54; *Morrison v. Holt*, 42 N. H. 478, 80 Am. D. 120; *Kincheloe v. Merriman*, 54 Ark. 557, 26 Am. St. 60.

In *Morrison v. Holt*, *supra*, the court said:

“If a husband does not himself provide for a wife’s support, he is liable for necessities furnished her, even though against his orders. He is also liable for legal expenses, where the conduct of the husband has rendered them necessary for the personal protection and safety of the wife. . . .

“In order to charge the defendant in the present case (an action to recover attorneys’ fees in a divorce suit), it is not sufficient for the plaintiff merely to show that the defendant’s misconduct gave occasion for the proceedings instituted, but it must also appear that those proceedings were necessary for the personal protection and safety of the wife. . . . The proceedings here were not had for her present, or even future, support as defendant’s wife, but were intended to dissolve the marriage contract and release her from the position of wife to the defendant, because of his past misconduct; they looked not to protection from any present or future act of her husband, but merely to the enforcement of a right to a change of future condition, that she claimed had arisen from his previous fault. It has not been the policy of our law to imply from the marital relation any authority in the wife to bind the husband for the expense of such proceedings; her implied authority, where it exists, seems to arise from the relation, if not as an incident essential to its preservation, certainly as a consequence of its continued existence, and not as a power reserved for its destruction. It is said that ‘it is never necessary for the safety of the wife, as such, to obtain a divorce from her husband or resist his obtaining one from her.’ . . .

“Upon the principles of the common law, the defendant is not liable in the present case. . . . It does not follow

that because the wife may have a right to a divorce, the husband is bound to furnish the means to obtain it."

In *Kincheloe v. Merriman*, *supra*, it was said, in a case involving the question under consideration here: "We cannot well understand how a suit for divorce could be necessary, or actually afford protection to the wife against personal abuse on the part of the husband."

See also, *Clarke v. Burke*, 65 Wis. 359, 56 Am. Rep. 631.

Wisconsin had a statute under which the court might require the husband to pay sums of money for the support of the wife and to enable her to carry on an action for divorce. The court, commenting on the statute, said that "the right to such suit money, as well as alimony, is, under the statute, wholly within the sound discretion of the court. Such was undoubtedly the rule in the ecclesiastical courts of England. But this is an action at law. It invokes no discretionary aid, and there is no authority in this action to exercise any. If the plaintiffs can recover, it is because they have a valid claim against the husband, as a matter of right. There is no pretense of any express promise or agreement on the part of the husband to pay the plaintiffs for the services rendered. There is no claim that the wife had any express authority to bind her husband to make such payment. The simple claim is that the services rendered were necessary to protect the peace, comfort, and rights of the wife, and hence there was in law an implied promise on the part of the husband to pay." The court passing upon the question said: "The reasons for not allowing actions at law for such services in actions for divorce are aptly stated by the Connecticut case (citing *Shelton v. Pendleton*, 18 Conn. 417, 423), in which it is said: 'The duty of providing necessities for the wife is strictly marital, and is imposed by the common law in reference only to a state of coverture, and not of divorce. By that law, a valid contract of marriage was and is indissoluble, and therefore by it, the husband could never have been placed under obliga-

tion to provide the expenses of its dissolution. Such an event was a legal impossibility. Necessaries are to be provided by the husband for his wife, to sustain her as his wife, and not to provide for her future condition as a single woman or perhaps as the wife of another man,' '' citing *Wing v. Hurlburt, supra*; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175, and cases heretofore cited. The court then proceeded to say: "There are cases holding that such an action may be maintained; but, upon the principles indicated, we decline to follow them, especially in view of our statutes."

In *Naumer v. Gray*, 5 N. Y. Ann. Cases 293, 28 App. Div. 529, 534, 51 N. Y. Sup. 225, that court held that an attorney can maintain an action against a husband for professional services rendered to the latter's wife in prosecuting an action on behalf of the wife against her husband for separation on the grounds of cruelty, but could not maintain an action for such services rendered in an action for an absolute divorce. Commenting upon the action for separate maintenance, the court said: "I think, from this collation of decided cases, it may be fairly said that the weight of American authority is in favor of the maintenance of an action like the present (i. e., separate maintenance). To succeed in it, the plaintiff must show affirmatively that the suit was for the protection and support of the wife, and that the conduct of the husband was such as to render its institution and prosecution reasonable and proper." And the court held that, upon such showing, the attorney who prosecuted the suit for separate maintenance may recover his fees, but that he could not recover fees for services rendered the wife in a suit for an absolute divorce. To the same effect is *McCurley v. Stockbridge*, 62 Md. 422.

On the other hand, there are cases supporting the doctrine as laid down in this state. *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. D. 637.

Gossett v. Patten, 23 Kansas 340, was an action brought

by Patten, as attorney, against Gossett for attorney's fees, in defending an action brought by Gossett against his wife for divorce. The court said: "We think the real question involved in this case may be stated as follows: Where a husband sues his wife for a divorce, charging her with committing acts derogatory to her character, and it is necessary for her, in order to protect her character and good name, to employ counsel to defend her, and she employs such counsel, who performs services for her, . . . and she has *no estate or means to pay* for such services, and when she applies to the court in a divorce case for an allowance of alimony . . . and before the court renders its decision, her husband dismisses the action, . . . may such counsel afterwards maintain an action against the husband . . . for the value of his services rendered in such case? We think he may"—but the court proceeded: "Of course, where the services are unnecessary, or where the wife is able to pay for them, or where an allowance has been made for them, and probably where the wife is in the wrong, such an action could not be maintained. . . . This case comes under the rule of requiring the husband to pay for necessities furnished the wife where the husband, without good cause, has failed or refused to furnish them himself." *McCurley v. Stockbridge*, 62 Md. 422; *Ceccato v. Deutschman*, 19 Tex. Civ. App. 432, 47 S. W. 739; *Peck v. Marling*, 22 W. Va. 708.

Applying the law, as we find it concretely to the case at bar, we are inclined to think that the plaintiff has not made out such a case as entitles him to recover for the services rendered for which he was allowed. In the instant case, it appears that the plaintiff instituted the action on her own initiative; that she employed counsel to prosecute the suit; that defendant appeared and filed a cross-petition; that thereupon the plaintiff dismissed her action and withdrew from the case; that thereupon the cause proceeded to trial upon defendant's cross-petition, and the court found the allegations of the cross-petition to be true, and granted to the defendant a divorce

from the plaintiff. The divorce could not be granted without an affirmative finding on the part of the court that the grounds alleged in the cross-petition, as a basis for the relief asked, were in fact true. Counsel, in the instant case, alleges that the charges were such as reflected on the character of his client, but, conceding that, the charges were established as true. They must have been, therefore, true at the time the petition was filed. The existence of the fact antedates the allegation or proof of the fact. Therefore, when these charges were made, they were true. The plaintiff's action in withdrawing from the case immediately upon the filing of these charges has persuasive, probative force upon the question of her knowledge of the truth of these facts. If the facts existed, her knowledge of the existence must have antedated the charge.

The statute provides the grounds upon which a divorce may be obtained. Any one of these grounds, unless justified, reflects upon the good name of the defaulting, erring spouse. The fact that the charges reflect upon her good name, if they were true, did not entitle her to employ counsel at the expense of her husband to defend against them. If this could be permitted, a wife who had been derelict in her duties under the statute, thereby laying a complete foundation for a divorce on the part of her husband, might, out of malice or caprice, involve him in great expense in proving the charges, even though they were absolutely true, and known by the wife to be true at the time. How it can be said to be necessary for a wife's protection to defend against charges of misconduct on her part, which, by her conduct, she admits to be true, and which, by the finding of the court, are established as true, does not occur to us at this time. The liability of the husband rests solely on the ground that the services were necessary for the protection of the wife, and from whatever angle this question has been approached by this court, the one central thought is found in all cases sustaining the right to maintain the action, and that is that the services rendered were neces-

sary for the protection of the wife, and all cases invoke the rule, in support of the conclusion reached, that the husband is liable, if at all, on the ground that the services rendered were necessary for the protection of the wife. The facts of this case do not show that to be true. We think, therefore, the court erred in allowing plaintiff anything in this cause, and the same is therefore—*Reversed*.

LADD, EVANS and PRESTON, JJ., concur.

EVANS, J.—I concur in the majority opinion. I do so with the saving suggestion that it does not purport to curtail the power of the divorce court to protect the wife's right of defending a divorce action at the expense of her husband, regardless of the final merits of such defense. I would not curtail such power of the court, nor encroach upon such right of the wife. Where, however, a husband has prosecuted his divorce action to a final adjudication and a decree has been entered therein in his favor, the attorney for the former wife cannot *thereafter maintain an independent action at law against such former husband for the professional services rendered to the wife in the divorce action*. Such has been our repeated holding in the cases cited in the opinion. None of our cases hold otherwise. And this last remark applies to *Read v. Dickinson*, 151 Iowa 369, which seems to be relied on as holding contrary to the previous cases. The allegation of the petition in the case at bar, that the wife had a good cause of action or a good defense in the divorce action, notwithstanding the decree to the contrary, was not available to the plaintiff herein. The issue thus tendered was susceptible to no proof except the decree actually rendered. Such was our express holding in the *Stockman* case, 140 Iowa 378.

DEEMER, C. J. (dissenting).—As the case was determined in the court below upon a demurrer to the petition, which admitted all facts well pleaded, we must accept the allegations of the petition as true. From these, it appears

that plaintiff, an attorney at law, was employed in the first instance by defendant's wife to bring an action against him (defendant) for a divorce; that defendant appeared to that action and filed an answer, and also a cross-petition, in which he sought a divorce from his wife, the plaintiff in the divorce suit. Pursuant to his original employment, and by the express direction of the wife, plaintiff filed an answer to defendant's cross-petition. The nature of this cross-petition was such as to injure the wife's name and standing, and plaintiff rendered the wife professional services in good faith for the protection of her name and standing against the charges made by her husband, and in order to procure for her the necessary means of support and proper maintenance during the course of the litigation, he (defendant) having notified dealers not to furnish the wife goods of any kind upon his credit. Plaintiff, in fact, had good and sufficient grounds for a divorce from her husband, but some time after the making up of the issues on the cross-petition, a decree of divorce was obtained thereon without the knowledge of the plaintiff. The trial court held, in effect, that, while plaintiff could not recover for services rendered the wife in preparing her action against her husband, he had the right to recover for services rendered her in preparing her defense to the cross-petition, and the appeal is from that ruling.

The majority correctly say that, as plaintiff has not appealed from the order, plaintiff's right to recover for services rendered the wife in the prosecution of her action is not involved, but they immediately proceed to a consideration of our holdings that an attorney cannot recover from the husband for services rendered the wife in an action brought by her wherein she is unsuccessful. These cases, to my mind, are entirely beside the mark. This appeal does not involve the right to compensation for such services, but for services rendered the wife in preparing her defense against an action brought by the husband. The fact that this action was, by cross-petition, filed in a suit brought by the wife is in no

manner controlling. She might, had there been no cross-petition, have dismissed her suit, and that would have ended the controversy; but the defendant, by cross-petition, brought into the case an alleged cause of action held by him against his wife, and this the wife could not ignore or dismiss. Why it was that she withdrew her appearance in the divorce action without consulting her attorneys is not explained; but it is agreed that the wife in fact had good and sufficient grounds for divorce against her husband, although, for some reason, she allowed her husband to take a decree against her on his cross-petition. Plaintiff's services were rendered in absolute good faith, and if the wife was in fact entitled to a divorce, as the petition alleges, the husband was not in fact entitled to a divorce against her. However this may be, plaintiff's services were rendered the wife in good faith to protect her good name and reputation, and to secure her support and maintenance during the trial of the action; and there was no decree or determination of the case against her until after the services now sought to be recovered were rendered the wife.

There is no express plea of fraud or connivance, and no showing as to the exact nature of the final decree, save that a decree was rendered on defendant's cross-petition. There are no allegations as to the settlement of any property rights, and nothing to indicate the grounds of the cross-petition.

The exact question here is this: May an attorney who is employed by a wife to render legal services in an action brought against her by her husband have compensation for his services from the husband when the husband is successful in his suit, the attorney rendering the services in good faith for the protection and security of the wife, she in fact having a good defense, although subsequently abandoning the same? Upon this proposition, our cases are, I think, in entire harmony. All of our decisions recognize the difference between services rendered by counsel in aid of an action brought by the wife, which fails for some reason or for no reason, and

like services rendered when the action is by a husband against the wife, especially where, as here, not only the good name and the fame of the wife are involved, but also her right to support. And this for the very good reason that the husband has denied his wife support and placed it out of her power to get it; and for the further reason that he himself has made the charges against the wife, and brought about the situation which authorizes her to act. If a stranger had brought a suit damaging to the wife's character or reputation, there could be no doubt of the husband's duty to employ counsel to defend against the suit, and if he neglected to do so, the wife could pledge his credit for that purpose, and this is undoubtedly the rule, even though the action were never prosecuted, or, if prosecuted, resulted in a finding against the wife. So long as the marriage relation exists, the husband is bound to protect the name and fame of his wife, and this does not cease because either he or some other person has the right finally to a judgment or decree which conclusively establishes the fault of the wife. Until that fault is judicially determined, the wife has the right to pledge the husband's credit. *Porter v. Briggs*, 38 Iowa 166.

In *Read v. Dickinson*, 151 Iowa 369, this court squarely held that "The fact that the parties jointly dismissed the action can make no difference with the plaintiff's right to recover. The charges had been made against the wife and made public. She had the right to defend against the charges in the cross-action and to employ counsel for that purpose, and whatever services were rendered her by the plaintiff in preparing her defense before the action was dismissed, the defendant is liable for under the rule of the cases cited. The very fact of the dismissal of the cross-bill is evidence of its want of merit."

Again, in *Preston v. Johnson*, 65 Iowa 285, 286, this court said: "The question under consideration seems to embrace this further proposition: whether the plaintiff in this case, in order to recover, must establish that the defendant's wife,

in the action for a divorce, was entitled to a decree. In other words, the proposition is whether the attorney who commences an action for a divorce for a wife against her husband is bound to establish, before he can recover from the husband for his services, that the wife was entitled to a divorce. This question must be answered in the negative. Conceding, as we must, that there is an implied liability imposed on the husband, we think that the attorney is entitled to recover for his services, when he acts in good faith, and there is no evidence of collusion, or that the action was brought for the purpose of oppression, and not to vindicate a right."

More conclusive still is *Clyde v. Peavy*, 74 Iowa 47. In that case, the husband brought action against the wife for adultery, and for cruel and inhuman treatment. She filed a cross-petition for a divorce from him because of cruel and inhuman treatment. On trial, both petition and cross-petition were dismissed. The wife's attorney brought action against the husband for attorney's fees. These were allowed, the court remarking: "The principle has been established in this state that in actions for divorce, the husband is liable to the wife's attorney for reasonable fees earned in conducting the litigation in behalf of the wife. This cannot be regarded as an open question. *Porter v. Briggs*, 38 Iowa 166; *Preston v. Johnson*, 65 Iowa 285."

Again, in *Baker v. Oughton*, 130 Iowa 35, 38, we said: "The argument in favor of this view is strengthened by the consideration that, where the husband seeks a divorce from his wife, whether originally or by cross-bill, he may properly be compelled to furnish her temporary support and to pay her attorney's fees; the reason evidently being that she should not be deprived of the means of making defense and that the court ought not to be compelled in advance to determine whether she has a good ground of defense. *Finn v. Finn*, 62 Iowa 482; *Sherwin v. Maben*, 78 Iowa 467; *Doolittle v. Doolittle*, 78 Iowa 691. Certainly there is no greater reason for allowing the wife temporary alimony and attorney's fees,

when the husband is seeking to procure a divorce from her on a ground that is sufficient on the face of it, than there is for allowing her the necessaries of life after he has driven her from home, and while she is endeavoring to secure a determination of the question whether his action was without justification."

Without reference to the merits of the case, it is the universal custom of the district courts to allow, to a wife sued for a divorce, suit money whereby to make defense to the action; and the rule of this court is to allow a wife who is appellee suit money as against her husband's appeal, without any investigation in either event of the merits of the case. It would have been quite proper for plaintiff, as soon as defendant filed his cross-petition in the original divorce action, to move for suit money, including counsel fees, before his client had filed answer, and there is no reason why, having already performed the services in good faith, he should be denied recovery.

Where, as in this state, married women may employ attorneys in order to bring any kind of suit, they may, undoubtedly, bind themselves by any contracts they may make in connection with the litigation commenced by them, and there is much reason for saying that if they bring divorce suits against their husbands, and are unsuccessful, attorneys should look to them alone for their pay. On the other hand, if they are sued by their husbands, and are without ability to pay for their defense, they should have the power to employ attorneys and charge their husbands with the expense thereof, even though they be unsuccessful in the end; for they are entitled to make defense to such actions, and attorneys, so long as they act in good faith and upon probable cause, should have recompense from the husband, even though he be finally successful in the suit. Any other rule would, in effect, compel an attorney to guarantee results, and thus deprive a wife of the means whereby to make defense. It is useless to cite authorities from other states, especially from those states which deny attorneys the right to recover from the husband

in any case, no matter how meritorious. The matter is fully discussed in 2 Nelson on Divorce and Separation, Secs. 876 and 877.

The reasons underlying the rule denying recovery seem to be, first, that the old English or ecclesiastical law regarded the marriage tie as indissoluble; and second, if allowed in actions for divorce, it would tend to promote discord and a destruction of the marriage relation. Neither reason is tenable in this state; for our statutes make the husband liable for family expenses and for necessities furnished the family, and also provide that the court may make allowances to either party in a divorce proceeding to enable such party to prosecute or defend the action.

In my opinion, the judgment should be affirmed.

WEAVER and SALINGER, JJ., concur in the dissent.

J. H. LAGRANGE, Appellee, v. W. C. SKIFF et al., Appellees,
THE CITY OF STORM LAKE, IOWA, Intervener and Appellant.

APPEAL AND ERROR: Appealable Judgment—Action to Enjoin Tax

- 1 —**Amount Involved.** A judgment or order, in an action to enjoin the levy and collection of present and future taxes, is appealable irrespective of the amount of taxes involved. (Secs. 4101, 4110, Code, 1897.)

TAXATION: City and Town Taxes—Agricultural Lands. Lands in

- 2 good faith occupied and used for agricultural purposes, and not subdivided into parcels of ten acres or less, are not taxable for general city and town purposes. (Sec. 616, Sup. Code, 1913.)

PRINCIPLE APPLIED: Plaintiff owned an undivided and unplatted 38 acres to the west of the city. The corporate limits were so enlarged as to extend to plaintiff's west line. The land was rented for \$13 per acre and was used for agricultural purposes, some 25 acres being in corn, some four acres in house, grove and nursery stock and the balance in pasture. The rental value was increased somewhat by reason of *proximity* to the city, but not because it was *within* the corporate limits. One street touched the southeast corner of the land. A road ran along the south side

of the land, but no city funds were expended thereon. There were some sidewalks in the neighborhood. There were two near-by gas posts put in by a former owner but never lighted by the city. The nearest city water main was 1,000 feet from the residence. The nearest street light was 856 feet from the nearest corner of the land. *Held*, the land was not taxable for general city purposes (library tax excepted).

Appeal from Buena Vista District Court.—HON. D. F. COYLE,
Judge.

MONDAY, MAY 10, 1915.

PETITION FOR REHEARING DENIED AUG. 13, 1915,
(Because not filed in accordance with rules).

ACTION in equity to secure the cancellation of a tax alleged to have been erroneously and illegally assessed and levied against plaintiff and against his property located within the present corporate limits of the city of Storm Lake, the tax being the levies made for city or municipal purposes for the year 1912. Plaintiff asks that defendants be enjoined from selling said property to enforce the collection of the tax. The city intervened, claiming that the tax was a legal and valid tax. The cause was tried November 21, 1913, and a decree rendered in favor of plaintiff, cancelling all levies and assessments for city or town purposes, and particularly for those purposes designated as the city fund, water fund, light fund, park fund, city bond fund, library fund, sewer fund, fire fund, or water bond fund. The defendants were enjoined from enforcing the collection of said tax. The city appeals. —*Affirmed*.

Faville & Whitney, for appellant.

James De Land, for plaintiff, appellee.

Guy E. Mack, for defendants, *Skiff* and *Bennett*, appellees.

PRESTON, J.—1. Appellee has filed a motion to dismiss the appeal on the ground that this court does not have juris-

diction, for the reason that the amount in controversy, as shown by the pleadings, does not exceed one hundred dollars, and there has been no certificate of the trial judge, as provided by section 4110 of the Code; that the only purpose of the action was to cancel the tax; that the removal of the apparent lien or cloud upon the title to plaintiff's land is only incidental and is relief which would follow as a matter of course with the cancellation of the tax, and therefore no interest in the real estate is involved. Cases are cited to this point.

1. APPEAL AND
ERROR: appeal-
able judgment:
action to en-
join tax:
amount in-
volved.

The action was commenced for an injunction. The prayer of plaintiff's petition is for a judgment and decree restraining and enjoining the defendants, or their successors in office, from selling or advertising for sale the land or any portion thereof, or collecting any portion of the tax, for any city purpose; that that portion of the tax be annulled and cancelled, and that any apparent lien upon the land be cancelled and removed; also that the auditor and his successor in office be enjoined from including in any tax levy against the land, or entering in the tax list for future years, any levy made for city purposes on said land so long as the same is used for agricultural and horticultural purposes. An injunction was granted in the final decree. Section 4101, Code, provides that an appeal may also be taken to the Supreme Court from: "(3) An order which grants or refuses, . . . dissolves or refuses to dissolve, an injunction," etc. The motion to dismiss is overruled.

2. There is but little, if any, dispute in the testimony. The only question in controversy between plaintiff and the intervener is as to whether or not the land described in the petition is subject to taxation for city purposes under section 616 of the Code.

2. TAXATION:
city and town
taxes: agricul-
tural lands.

Plaintiff's property consists of about thirty-eight acres in the west part of the city. The land was not embraced

in the corporate town as originally incorporated. The corporate limits were extended in 1890 so as to include the land in controversy. The west boundary line of the incorporated town, after such extension, is the west line of plaintiff's land. Since said date, the town of Storm Lake has become a city of the second class. Plaintiff does not carry on the land himself, but has it rented for five hundred dollars a year, or thirteen dollars an acre. About twenty or twenty-five acres of it has been in corn and other crops; about four acres is taken up with the house, grove and nursery stock, and the balance is in pasture. There is no dispute in the record as to the use of the property for agricultural purposes, and we find nothing in the record to indicate bad faith on the part of the owner in so using it. The land has never been platted.

Appellant claims that the land in controversy was in such close proximity to the settled and improved parts of the city that the corporate authorities cannot open and improve its streets and alleys and extend to the inhabitants thereof its usual police regulations and advantages without incidentally benefiting said land and enhancing the value of the same. It relies on the following cases: *Fulton v. City of Davenport*, 17 Iowa 404; *Brooks v. Polk County*, 52 Iowa 460; *Tubbesing v. City of Burlington*, 68 Iowa 691; *Farwell v. Brick Mfg. Co.*, 97 Iowa 286; *Windsor v. Polk County*, 109 Iowa 156.

The *Fulton Case* was decided before section 616 was enacted, and lays down the rule substantially as contended by appellant,—that, under such circumstances, the power to tax the property arises. But it was also said in that case that in the exercise of such power, great care and circumspection should be observed, lest, perchance, injustice and oppression may ensue.

The rule was approved in the *Brooks Case*, where it was held that the land was taxable for municipal purposes because of the facts which are set out in the opinion. Cities ought not to extend their limits and unnecessarily include farm land for the purpose of increasing their revenues, and, on the other

hand, a person whose property is included within the city limits and who is benefited by expenditures of city money, who has the conveniences incident thereto, and who comes within the rule announced by the cases, ought to pay city taxes.

As stated in the *Fulton Case*, and approved in the *Brooks Case*, it is apparent that every such case will have to be determined upon its own peculiar circumstances, without regard to any definite or fixed rule, and hence, doubtless, the decision in some instances will appear quite arbitrary, and perhaps unsatisfactory.

In the *Tubbesing Case*, the facts are not set out, but the court concluded that plaintiff had not affirmatively shown facts which entitled his land to exemption.

In the *Farwell Case*, it was held, substantially, that a mere temporary occupation and use of land for agricultural purposes, when purchased for speculation, with intent to lay it out into lots and sell them, is not a good-faith occupancy and use for agricultural purposes within the meaning of the statute.

The *Windsor Case* was in regard to a tract of sixteen acres, worth \$20,000, on which was the owner's dwelling house, which, with improvements, was worth \$30,000, and the tract, which was not platted and divided by streets, faced a prominent city street which, at that point, contained sewers, gas and water mains, and it was held the land was taxable.

In *Allen v. Davenport*, 107 Iowa 90, it was held that lands within the limits of a city are not used and occupied in good faith for agricultural or horticultural purposes so as to be exempt when a portion only is used for farming and the remainder for lumber yard, stone quarry, an ice house, pasturage and a nursery, and is close to a well-settled part of the city, having many of the city conveniences.

But we are of opinion, from a reading of the record, that the facts in the instant case are not sufficient to bring the case within the rule. But little, if any, benefits accrued to

plaintiff's land from expenditure of city taxes. It is true plaintiff testified that the rental value of this land is somewhat enhanced by reason of the land's being in close proximity to the city, but not because it was included within the corporate limits. This would ordinarily be true if the land were just outside the city limits. Another witness puts it, that the land being in such close proximity to the city, adjoining its streets and streets abutting on it, the extension of the street lights and water mains on another street and the expenditure of money in the west end of town increases the value of this property. Plaintiff testifies:

"I did at one time discuss with Mr. Brunson, an engineer, the question of making surveys and platting this land, and told him that if I did, I wanted him to do it for me, but I never decided to do it. I bought this land because I thought it would advance in price and I thought I could sell it. I knew because of its close proximity to Storm Lake, and the manner in which Storm Lake was building up, that it might become valuable in the future for town lots, but I could have made the same money on most any kind of land in the county anywhere else."

It appears that plaintiff has contracted to sell twenty-six acres of this land, and this, as we understand it, since the suit was brought, or at least since the tax for 1912 was levied. The prospective purchaser testifies that he expected to farm the twenty-six acres, and plaintiff testifies that he expected to farm the remaining twelve acres, and, in fact, the entire property was farmed for the year 1913.

We shall not attempt to set out all the facts, but enough to show the general situation. There are no houses west of plaintiff's within the corporate limits. Four or five new houses have been built within a year or two east and southeast of plaintiff's property, and within a block or two. Sixth Street in the city extends to the southeast corner of plaintiff's property. For many years, and before the city limits were

extended west to include the land in controversy, there was a public highway running west on the south side of plaintiff's land to the west line thereof. But the evidence is that no city money has been expended upon this road. Plaintiff's house is some distance north from this road, with a private way over plaintiff's lands from the street to the house. There is a street one block south of plaintiff's property, running east and west, on which there is a cement walk a part of the way. The land south of plaintiff's property has not been platted, but is in subdivisions of from one and a half to eleven acres. Plaintiff's land extends north from the highway above referred to, and which interveners call Sixth Street, to the railroad. There is a cement walk a part of the way from the southeast corner of plaintiff's land west to the private driveway which runs north to his house, but this was put in by a former owner of the property. There is a gas post at the south line of plaintiff's property in the highway and near the private driveway going to plaintiff's house, and another at or near the southeast corner of plaintiff's land, and a gas pipe in front of the street or highway south of the land. But the evidence shows without dispute that in former years, the property in controversy was owned by one Unger, who farmed the land and lived upon it with his family as his home. At the same time, he was the owner of a gas plant in the city and held a franchise to use the streets and alleys for his gas pipes; and under these conditions, at his own expense, and for his own private use, he extended a gas pipe from his house to one of the city mains and erected along this line two iron posts for street lights. The city had nothing to do with it, and the lamps were never lighted by the city nor for the city. There is no other road or street along plaintiff's property except the one before referred to on the south; the land northwest and south, or much of it, is farm land. There are no water pipes of the city extending out to or touching this land. The main is 896 feet from the

corner of the land, and 1,000 feet or more from the building. The nearest street light is 856 feet from the nearest corner.

From these and other circumstances in the case, and from all the facts, we conclude that the trial court rightly decided that the land was exempt under the statute.

3. By the decree entered January 17, 1914, it is adjudged that all levies and assessments of taxes made against the land in question to this date for city or town purposes, and which included library fund, are cancelled. It is said in argument that the attention of the trial court was not called to chapter 52, Acts of the Thirty-Fifth General Assembly, which provides that lands provided for in section 616 shall not be exempt from taxation for library purposes, and it is contended by counsel for appellant that, as the decree cancels everything to the date of the decree, this was erroneous. Counsel for appellee concede this, or at least state that they make no claim of any right to cancel the library tax for the year 1913. Doubtless the matter of the amendment to section 616 in regard to the library tax was overlooked. At any rate, it ought not to be cancelled for the year 1913, and the decree should not be so construed. As stated, appellee concedes this to be so.

To the extent of the library tax for 1913, the decree is modified; in other respects affirmed. The costs will be taxed to appellant.

DEEMER, C. J., WEAVER and EVANS, JJ., concur.

LUCILLE ADDIS, Appellee, v. C. F. APPLGATE, Appellant.

HABEAS CORPUS: Application for Writ—Venue—“Judge Most
1 Convenient in Point of Distance.” One seeking to test the legality of his imprisonment by habeas corpus may consult his own convenience as to the venue by applying for the writ to *any* district judge of the state (Sec. 4419, Code, 1897), howsoever remote such judge may be from the place of imprisonment, alleging that such judge is the “most convenient in point of distance”

to him (Sec. 4420, Code, 1897), even though there may be other judges nearer in point of distance to such place of imprisonment; and if such judge deems the application sufficient, even erroneously, he has jurisdiction to issue and determine a writ running into any part of the state.

HABEAS CORPUS: Issuance of Writ—Public Officers. When a writ
2 of habeas corpus is leveled at a public officer, his official character neither enlarges nor abridges his rights. (But now see, as bearing thereon, Sec. 4420, Code, 1897, as amended by Ch. 293, Acts 35 G. A.)

**HABEAS CORPUS: Venue—Habeas Corpus Statutes Exclusive—Gen-
3 eral Statutes Not Applicable.** The venue in an action for a writ of habeas corpus is exclusively governed by Secs. 4419, 4420, Code, 1897. The provisions of Secs. 3494, Code Sup., 1907, 3504, Code, 1897, governing, generally, the procedure when actions are brought in the wrong county and when actions involve acts done by virtue of a public office, in no manner control the venue in habeas corpus.

**HABEAS CORPUS: "Inebriate" Act—Commitment "Until Cured"
4 —Power of Court to Determine Question of Cure—Parole.** When, under the Hospital for Inebriates Act, the commitment of an inebriate was, under Sec. 2310-a12, Sup. Code, 1907, "until cured, and not exceeding three years," the court or judge on habeas corpus proceeding may determine whether or not the patient is *cured*, irrespective of the discretionary power of the board of control to discharge (Sec. 2310-a12, Sup. Code, 1907), and irrespective of the power or duty of the governor to parole patients. (Sec. 2310-a3, Sup. Code, 1907.)

**APPEAL AND ERROR: Habeas Corpus—Appeal Not Heard De
5 Novo.** An appeal in habeas corpus is not heard *de novo*. A finding of fact by the trial judge will be treated as the finding of a jury.

**HABEAS CORPUS: Right to Writ Irrespective of Statute—"In-
6 ebriate" Act.** The right to the writ of habeas corpus is always present and available, not by virtue of any statute, but by virtue of the Constitution. (Sec. 13, Art. I.) Along with the right to demand the writ, under permissible regulations of law, and along with the right and duty of the court or judge to issue the writ, in a proper case, goes the right to determine every matter of fact upon which the legality of the imprisonment depends. Under the Inebriate Act, and under a commitment "until cured and not exceeding three years," *held* that the superintendent of

the hospital did not have the exclusive right (Sec. 2310-a3, Sup. Code, 1907) to determine when the patient was cured, and that such question could be determined on habeas corpus.

LADD, J., concurs in first division of opinion, dissents as to second division.

DEEMER, C. J., and PRESTON, J., dissent.

Appeal from Clayton District Court.—HON. W. J. SPRINGER, Judge.

TUESDAY, SEPTEMBER 21, 1915.

PLAINTIFF, being confined as an inebriate in the Hospital for Insane at Mt. Pleasant, applied to Hon. W. J. Springer, one of the judges of the district court of Clayton county, for a writ of habeas corpus, alleging that she had been cured, and was entitled to her liberty, and was being illegally restrained. The judge issued the writ and the plaintiff was brought before him for hearing. The defendant, superintendent of the hospital, moved to quash the writ, on the ground that the application was not made to a judge most convenient in point of distance to the applicant. This was overruled. Thereupon he filed a motion for a change of venue, which was also overruled. Thereupon the defendant filed answer and return to the writ, denying that the plaintiff was cured, and alleging that the judge before whom the proceedings were instituted had no right or authority to determine the question as to whether she was cured or not. Judgment was entered for the plaintiff, and she was discharged. Defendant appeals.—*Affirmed.*

George Cosson, Attorney General, and *C. A. Robbins*, Assistant Attorney General, for appellant.

J. A. Hanley, for appellee.

GAYNOR, J.—Division I. On the 29th day of April, 1911, the plaintiff was adjudged to be a fit subject for detention and

treatment at the Iowa State Hospital for Females at Mt. Pleasant, as an inebriate. The order for her de-

1. HABEAS CORPUS: application for writ: venue: "Judge most convenient in point of distance."

tention was made by the district court of Clayton county, and provided that she be committed to and detained in said hospital *until cured, not exceeding three years*. It was made

to appear at said hearing that she was addicted to the excessive use of morphine. No question is made about the propriety or sufficiency of the order of commitment, or the proceedings under which the order was made. Nor is there any claim that she was not at that time a fit subject for detention in the hospital for inebriates. The order for her detention was issued to the sheriff of Clayton county, commanding him to deliver her, without delay, to the superintendent of the Hospital for Inebriates at Mt. Pleasant, and this was accordingly done. The defendant herein, C. F. Applegate, was at the time, and is now, the superintendent of the hospital, and he received her and took her into his custody under and by virtue of such order, and was so detaining her at the time this action was commenced.

On the 18th day of August, 1912, the plaintiff filed a petition for writ of habeas corpus before Hon. W. J. Springer, one of the judges of the district court in and for Clayton county, this being the county in which the judgment of commitment was entered, and the one in which she then resided. The application for the writ of habeas corpus states, and the fact appears to be, that she was committed to the care of the defendant on the 2d day of May, 1911, under said order for treatment. It is claimed that plaintiff is entirely cured of the morphine habit; that the defendant herein, the superintendent of the hospital, knowing that she is cured, refuses to restore her to her liberty or to discharge her from his custody, and that, therefore, her further confinement and custody in said hospital and her further restraint by the defendant are illegal. Plaintiff further alleges, in her application for the writ, as a reason for not making application to the nearest court or

judge, that the judge to whom the application was made was most convenient, in that she can procure testimony at the time of hearing to much better advantage and with less expense than can be done in any other county in the state. There are other allegations in the application for the writ which are not material to this controversy, and are not, therefore, set out.

Upon the filing of the petition aforesaid, Hon. W. J. Springer, on the 18th day of August, 1912, ordered that a writ issue in due form, as provided by Sec. 4423 of the Code, commanding this defendant to bring the plaintiff before him on the 17th day of September, 1912, at the hour of 9 o'clock A. M., to be dealt with according to law. On said date, the defendant herein appeared before said judge and filed the following motion, which was, on the same day, overruled:

"Comes now the defendant in the above entitled cause and moves the court to dismiss the petition of plaintiff filed herein and to remand the plaintiff to the custody of the defendant for the following reasons:

"1st. It appears by the allegations of said petition that the plaintiff was, at the time of the filing of said petition, confined at the State Hospital for Female Inebriates at Mt. Pleasant, in Henry county, Iowa, and it is not shown that said petition was presented to the court or judge most convenient to the applicant from the point of distance, as required by Sec. 4420 of the Code; nor is said action brought in the county where the cause arose, as required by Code Sec. 3494.

"2d. For the reason that this court has no jurisdiction to issue the writ of habeas corpus issued herein, because the judges of the district court of the judicial district in which Henry county is situated were, at the time said petition was filed and said writ issued, most convenient to the applicant in the point of distance."

Thereupon the defendant filed a motion for a change of venue from Clayton county to Henry county, supported by

the affidavit of the defendant, in which he states that he is an actual resident of Henry county; superintendent of the Hospital for Females at Mt. Pleasant; that his official acts are performed in Henry county; that he was a resident of said county at the time the action was commenced; that the only restraint of the plaintiff made by him is as superintendent of the hospital, and at said institution. This motion being overruled, the defendant made his return to the writ, in which he admits the commitment and confinement of the plaintiff at the times and places alleged in her application, and further challenges the jurisdiction of Judge Springer to issue the writ, or to try, hear, or determine the issues involved; alleges that there are two judges of the district court, one residing in Mt. Pleasant, where plaintiff is confined, and one residing in Burlington, both of whom are more convenient in point of distance to the applicant than is Hon. W. J. Springer. Upon the filing of the said return, the defendant asked that plaintiff's petition be dismissed; that she be remanded to his custody, to be detained by him in obedience to the writ of commitment. Thereupon the cause proceeded to trial upon the issues joined, and, upon such hearing, the plaintiff was discharged. From the action of Judge Springer in the premises, the defendant appeals, and assigns as error:

1. The court erred in overruling defendant's motion to dismiss and remand.

2. The court erred in overruling defendant's motion for a change of venue.

3. The court erred in assuming the power to determine the question of fact as to whether or not the plaintiff is cured, when this was solely a question to be determined by the superintendent of the inebriate department of the hospital.

We shall consider these assignments in the order in which they were made.

Division I. Did the court err in overruling the defendant's motion to dismiss and remand?

Section 4420 of the Code provides:

“Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to therefor, *may* refuse the same, unless a sufficient reason be stated in the petition for not making the application to the more convenient court or a judge thereof.”

The Supreme Court of this state, the district courts and the superior courts, and each and every judge of each and every one of these courts has jurisdiction to entertain an application for a writ of habeas corpus and to allow the writ upon a proper showing, and the writ, when issued, “may be served *in any part of the state.*” Section 4419 of the Code. We start, then, with the proposition that each of the district judges of this state is, by virtue of the statute, invested with the power to entertain an inquisition of this character, and, upon proper application, to issue a writ, which, when issued, may be served upon anyone within the limits of the state. Section 4420 puts some limitation upon the exercise of the power so invested, in so far as it says that the “application for the writ must be made to the court or judge most convenient in point of distance to the applicant.” It does not say, however, that a more remote judge, if applied to, may not issue the writ upon a showing that a citizen of the state is illegally deprived of his liberty. It does not assume to take from the more remote judge the jurisdiction given him under and by virtue of the provisions of Sec. 4419, but says that he *may* refuse to grant the writ “unless a sufficient reason be stated in the petition for not making the application to the more convenient court or a judge thereof.” The statute does not define what is meant by “a more convenient court or judge,” unless we infer, from what precedes, that it was intended by the legislature to mean in point of distance. The statute does not say that the application shall be made to the judge *nearest* in point of distance to the applicant, but to the one “*most convenient* in point of distance.”

It has been held by this court that the applicant referred to in the statute is the party restrained of his liberty. Therefore it follows that the writ must be applied for to a judge most convenient in point of distance to the party restrained of his liberty. The thought of the legislature seems to be that the convenience of the party restrained is the controlling factor in the selection of the judge. In the application in this case, it was asserted by the applicant that Judge Springer, to whom the application was made, was more convenient to the applicant in point of distance. This allegation was based upon the alleged reason that a hearing before him would be more convenient, in that the testimony upon the hearing could be procured with less expense, and to much better advantage, than could be done in any other county in the state. The application, therefore, tendered a question of fact, upon which the judge was called upon to act, and upon the proof of which rested his right to grant or refuse the writ. In assuming jurisdiction, he must have found this allegation to be true. He must have found affirmatively that it was more convenient to the applicant in point of distance to make the application to him, than to a judge nearer in point of distance.

Cases may arise in which this is absolutely true, and the court, in passing upon the application, in a fair consideration of all conditions, might readily so determine. His determination of this question is made upon the allegations of the application. Does the fact, if it be a fact, that upon a hearing in this court it appears that his determination was not well founded, or that he erred in his determination upon this question, oust him of jurisdiction? The Constitution of this state recognizes the writ of habeas corpus as an existing remedy in all cases in which it is properly applied for. The statute herein set out designates the courts or officers which may issue a writ. The statute does not attempt to point out, nor could it conveniently do so, all the cases in which the writ may be applied for or used. The proceeding is in the nature of an inquisition—to inquire into and determine, upon proper

application, whether the party complaining is or is not unlawfully restrained of his liberty. The right to the writ antedates our Constitution and our statute. They attempt only to reassert the right and to maintain it inviolate, regulating, however, the manner of its use. We are, therefore, compelled to look to the common law, the statutes of the state and the decisions of the courts, to determine the cases in which the right may be employed and the manner in which the right to the writ may be exercised.

The primary question, in all proceedings of this kind, is whether or not the applicant is illegally restrained of his liberty at the time the application is made. It is immaterial, so far as the right to the writ is concerned, whether or not he was originally restrained by criminal or civil process. The question to be determined upon the hearing is, Is he now lawfully or unlawfully restrained?

The writ may be applied for and secured upon the application of the person confined, or the application may be made on his behalf by another, or the writ may be issued by the court on its own motion in a proper case.

To entitle the applicant to the writ, there must be at least a prima-facie showing made in the application that the detention or confinement of the applicant is unlawful. Without such prima-facie showing in the application itself, the writ ought to be denied. This court, in the case of *Ware v. Sanders*, 146 Iowa 233, 240, speaking through Judge Weaver, said:

“Both by motion and in argument counsel for the State attack the jurisdiction of this court to entertain or pass upon plaintiff’s petition, because the application for the writ was not made to the court or judge most convenient to the petitioner, as provided by Code Sec. 4420. While the section referred to provides a general rule directing the application to be made to the most convenient judge, it does not expressly provide that such judge has exclusive jurisdiction, nor does

it command the more remote judge to whom it may be presented to refuse the writ, but the language is that he 'may refuse the same.' The phrase 'convenient in point of distance' is one of quite indefinite meaning, and often might reasonably be applied to any one of several judges residing in different localities. The statutory restriction serves to put the judge upon his guard, and suggest inquiry into the propriety of his entertaining the proceeding and the good faith of the applicant in coming to him, but we think it is not a jurisdictional question. If, as is provided in some states, the statute required the matter to be first presented to a judge of the county or district where the plaintiff is restrained, an objection to an application first made elsewhere would raise a very different question; for, in such case, a territorial limit is clearly and explicitly defined, and no room is left for construction."

This language is in point here. The same issue was tendered there as is tendered here, and the decision sustained the right of a more remote court or judge to assume jurisdiction and determine the controversy there.

It will be further noted that the statute says the application must be made to the judge "*most convenient* in point of distance to the applicant." The convenience of the applicant seems to be the controlling thought of the legislature in the selection of the judge. There is nothing in the statute indicating that the legislature intended that the convenience of the party charged with the illegal restraint should be considered. It therefore occurs to the mind that it is not a matter of which he can complain if the application is made to one, though not convenient to him, who is alleged to be and claimed to be, convenient to the applicant. The question of convenience to the applicant is a matter that affects him alone, and if it is inconvenient for him to select a remoter judge, it is not for the other party to make complaint. No right is given defendant to select, nor is his convenience provided for in the statute.

against whom the writ runs to obey the same and bring before the judge the party alleged to have been illegally restrained, to explain and justify, if he can, the fact of restraint or imprisonment. The very purpose and object of the remedy is to give speedy and effective relief to those who are deprived of their liberty wrongfully, no matter by whom, or under what claim the imprisonment is made. The application is made originally for the sole purpose of compelling the person against whom it runs to produce before the court or judge the body of the person claimed to have been illegally restrained, in order that the cause of his detention may be inquired into. Where a public officer is charged with restraining one wrongfully of his liberty, and a writ issues, he must produce before the court, in obedience to the writ, the person alleged to have been wrongfully restrained. So far as the proceeding in habeas corpus is concerned, his responsibility ceases when he has done this. This court then passes upon all questions, both of law and fact, and determines the ultimate question whether the person is or is not wrongfully restrained of his liberty. The proceeding is instituted and carried on for his benefit. The officer presumably is not personally interested in the outcome. It is not, in a technical sense, a suit between the applicant and the officer, and the officer is not liable for costs in this proceeding, nor can he be mulcted in damages, even though it be made to appear that the restraint is wrongful. The proceeding is simply to fix the status and rights of the applicant, his right to liberty or otherwise; and if it appears that he was wrongfully restrained, he must be discharged. As stated by Mr. Justice Bleckley in *Perry v. McLendon*, 62 Georgia 598, 604:

“The writ should be issued, providing the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though complained of as illegal, is in fact legal.”

It would seem, therefore, that it is the duty of the court or judge to whom the application is presented, before issuing the writ, to inspect the application to see if it contains sufficient averments, is in due form of law, and properly subscribed. If it does not, he should refuse to issue the writ. If it does, it is his duty to grant it. In *Simmons v. Georgia Iron & Coal Co.*, *supra*, Justice Cobb, speaking for that court, said:

“We know of no law which authorizes either the person against whom the writ is prayed, or anyone else, to come into court and object to the issuance of the writ. There is no precedent for an objection of this character. It is a matter to be determined solely by the judge. And, even after the writ is issued, and the respondent has appeared in answer to it, the sufficiency of the petition (to justify the issuance of the writ) cannot be tested by demurrer, though it seems that a motion may be made to quash the writ because of insufficient averments.”

We are aware of what this court said in *Thompson v. Oglesby*, 42 Iowa 598. In that case, the application was made by one other than the person confined, and the question arose as to who should be considered the applicant in determining the venue, and it was there determined to be the party in whose interest the application was filed, and not the person making the formal application. The question here considered was not determined. It was assumed that the writ was wrongfully issued if not made by the judge nearest to the person in whose interest the application was made, and it was assumed that the evidence showing the legality of the imprisonment would be at the place where the applicant was restrained, and the court assumed that this provision of the statute as to the venue was made in the interest of the defendant, the party charged with the illegal restraint; for in that opinion it is said: “If the imprisonment is legal, the *defendant* should be allowed to show it with the least possible trouble and expense.”

It is also said,—and in this there is a suggestion that the rights of the applicant ought to be considered: “There is no reason why his imprisonment should continue until he can be brought before some remote court or judge, wherever some person may happen to be who desires to present the petition in his behalf.” The court further said: “This case has been argued upon the supposition that if Hannah M. Thompson (mother of the person restrained, and the one who made the application) is not the applicant, within the meaning of the statute, the motion for a change of venue should have been granted. In our consideration of the case we shall proceed upon the same supposition.” The only question involved in that case, as appears from the statement of the issues, was not the jurisdiction of the judge granting the writ to issue it, but the right of the party against whom it was issued to have the venue or the hearing changed to the county in which the party was illegally restrained. We do not think the question here presented was in that case involved in the issues considered or determined. It will be noted that, at the time this action was commenced, chapter 293 of the Acts of the Thirty-Fifth General Assembly was not in force, and the same rule applied to public officers and to the citizen alike.

The next contention, that the court erred in overruling defendant's motion for a change of venue from Clayton county to Henry county, is involved in what we have said. This motion was made before the defendant had made any return, and was based upon the following affidavit:

8. HABEAS CORPUS: venue: habeas corpus statutes exclusive: general statutes not applicable.

“I, C. F. Applegate, being duly sworn, on oath state that I am now, and for more than eight years last past have been, an actual resident of Henry county, Iowa, and, during said time, have been superintendent of the State Hospital for Female Inebriates at Mt. Pleasant, Iowa, and all my official acts are and have been performed in said Henry county, and

was a resident of the said county at the time of the commencement of this action, and the issuance and service of the writ of habeas corpus herein; and my only restraint of plaintiff has been as superintendent of said hospital; all of which is true as I verily believe.”

This affidavit for the change rests entirely upon the thought that the defendant is a resident of Henry county, and is superintendent of the State Hospital for Females at Mt. Pleasant, in said county; that he was a resident of the county at the time the writ was sued out; and that the only restraint of the plaintiff by him was as superintendent of the hospital; and proceeds upon the theory that he is entitled to have the venue changed to the county of his residence. Now it is apparent that, if the court had jurisdiction of the subject-matter and of the parties, and had a right to issue the writ and the right to hear and determine the question involved, the fact that it would be more convenient for the defendant to have the hearing in the county of his residence would not be sufficient ground for changing the venue. There is no showing in the application for a change of venue that it would be more convenient for the applicant to have the hearing in Henry county, but it proceeds upon the theory that the statute requires the venue to be laid at a place nearest, in point of distance, to the place of confinement, and this the statute does not require. The judge to whom the application is made is invested with some discretion. Of course, it is a legal discretion, but the question as to whether he will assume jurisdiction or not, if he be the more remote judge, must be determined by him upon the application submitted and the nature and character of the investigation sought. It is not to be assumed that he will abuse his discretion in this respect and assume jurisdiction to the detriment of the public or to the embarrassment of the fair administration of the criminal laws or of the officers charged with their enforcement. The mere fact that the defendant is a nonresident of the

county in which the judge resides, or in which the judge is at the time the writ is issued, the mere fact that there are judges nearer to the point where the plaintiff is restrained (and there is no showing of this fact in the affidavit for a change of venue) than the one issuing the writ, are not in themselves grounds for a change of venue.

The defendant relies on Sec. 3504 of the Code of 1897 as giving him the right to the change in venue for which he applied. This statute provides:

“If an action is brought in a *wrong* county, it may there be prosecuted to a termination, unless the defendant, before answer, demands a change of place of trial to the proper county, in which case the court shall order the same at the cost of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at the wrong county.”

The defendant also relies upon Sec. 3494, Code Sup., 1907, second division, regulating the place of bringing actions, in which it is provided that actions for the following causes must be brought in the county where the cause or some part thereof arose: “Those against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office.” A casual reading of the statute authorizing the issuance of the writ will show that these limitations do not apply. There is no question, under this statute, that the plaintiff had a right to apply to Judge Springer, of Clayton county, for the writ. There is no question that he had a right to refuse the writ (though not obliged to do so), if it was made to appear to him that there was another judge more convenient in point of distance to the applicant. There was invested in him, by the statute, a judicial discretion in the matter. An error of judgment on his part as to the existence of conditions which ought to suggest to him the propriety of refusing, even though such conditions were in the statute, would not oust him of

jurisdiction, or a right to hear and determine the question. The legislature, in saying that he had a right to refuse the writ,—in saying that he *may* refuse the writ, not that he must refuse the writ,—evidently were not afraid that the judges of the district would abuse the discretion invested in them, to the prejudice of the public good, and we think we ought not to assume to entertain any such fear. The remoter judge, having jurisdiction of habeas corpus proceedings, and a right to entertain inquisitions of that character, may exercise that jurisdiction upon any showing which satisfies him that the interests of justice would be thereby more nearly attained. There is no limitation on the right of any judge of the district court of Iowa to issue a writ of habeas corpus on proper application, running into any part of the state. Indeed, that right is given him by the statute, and upon a proper showing for a writ, a wrongful or unlawful refusal to grant the writ subjects him to a penalty. But the legislature says that he must refuse the writ, even though properly applied for, if, from the showing of the petitioner, it is apparent that the petitioner would not be entitled to any relief, or he *may* refuse it, unless a sufficient reason be stated in the petition for not making the application to a more convenient judge or court.

We think the motion for a change of venue was properly overruled.

Division II. Upon this appeal the defendant states his last ground for reversal in the following language:

4. HABEAS CORPUS: "Inebriate" Act: commitment "until cured": power of court to determine question of cure: parole.

"The court erred in assuming the power to determine the question of fact, as to whether or not the plaintiff is cured, when the matter was wholly for the determination of the superintendent of the inebriate department of the State Hospital."

This question was not involved in the motion to quash the writ, but appears only in the answer or return made by the defendant, and was made in the following language:

“The defendant further alleges that the plaintiff is not cured, and has never been found to be cured, either by the defendant, or by the board of control.”

Whether this allegation in the answer was made for the purpose of tendering an issue of fact with the plaintiff as to whether she was cured or not, or whether it was intended to raise the legal question that the court had no jurisdiction to inquire into the fact whether she was cured or not, does not appear.

Whether she was cured or not was a question of fact. Whether the court had a right to inquire into the fact is a question of law. The question of fact was determined adversely to the appellant in the court below.

5. APPEAL AND
ERROR: habeas
corpus: appeal
not heard
de novo.

The case is not triable *de novo* here. If the court had a right to consider and determine this question, its finding is binding upon the defendant. There was evidence to support the finding of the court, and we treat it the same as the verdict of a jury.

In discussing this question as to the right of the court to hear and determine the question, the plaintiff relies upon Sec. 2310-a12 of the Supplement to the Code of 1907, as follows:

“The board of control of state institutions may discharge any person committed to a state hospital under the provisions of this act on the recommendation of the superintendent when satisfied that such person will not receive substantial benefit from further hospital treatment.”

This has no application to the case at bar.

The plaintiff also relies on Sec. 2310-a3, which provides:

“If after thirty days of such treatment and detention a patient shall appear to be cured, and if the physician in charge and the superintendent of said institution shall so recommend, the governor shall parole said patient, provided

that said patient shall pledge himself" as provided in said section.

There is no provision in this chapter for the release of one confined in a state hospital for inebriates by habeas corpus proceedings. Nor is it necessary that the statute should confer such right. It is a right guaranteed by the Constitution, and a right that cannot be suspended or refused by legislation. See Sec. 13, article 1, in Bill of Rights, Iowa Constitution. In cases where parties are confined in insane asylums in this state, there is a special provision of the statute as follows:

6. HABEAS CORPUS: right to writ irrespective of statute: "Inebriate" Act.

"All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing. If the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason." (Sec. 2306, Code, 1897.)

It will be noticed that the plaintiff herein was not ordered confined for any definite time. The order provided that she be confined in the hospital until cured, not exceeding three years. Whenever she was cured, she was entitled to be released. Any restraint after she was cured would be a violation of her constitutional right to liberty. These statutes relied upon do not provide any tribunal for determining whether a patient, confined in this hospital, is cured or not. Subdivision a3 of Sec. 2310 only provides for a parole by the governor in the event she shall appear to be cured, and the superintendent and physician recommend her parole. There is no provision for any hearing upon the question of an absolute cure, or her right to be absolutely discharged, upon a showing that she is cured, and there is apparent to us no more reason why a person confined in an insane asylum

as insane should have a right to be heard in a proceeding of this kind, as to whether she is cured or not of her insanity, than there is for a hearing of the same character and kind where one is confined as an inebriate. As soon as cured, the purpose of confinement was accomplished. No longer was there any right, under the order or under the statute to confine her. When the right to confine expired, the right to her liberty arose. When this was refused, her right to the writ to determine her right to liberty was the only avenue of escape.

Sec. 7, chapter 80, of the Acts of the Thirtieth General Assembly provides: "The term of detention and treatment shall be until the patient is cured, and not exceeding three years." The provisions of this act are incorporated in the Supplement of the Code of 1907 as Sec. 2310-a12. The three-year limitation is a limitation upon the right to hold the patient whether cured or not. At the expiration of three years, whether the patient be cured of his malady or not, the right to hold him longer, under the order of commitment, expires. This statute gives a right, under proper order, to hold the patient until cured, but whether cured or not, not to exceed three years. The only provision of the statute authorizing the holding of an inebriate for a full three years is found in chapter 184 of the laws of the Thirty-Fifth General Assembly, which provides for the creation of a department to be known as the custodial department, and Sec. 2 of this act (Sec. 2310-a34, Code Sup. 1913) provides:

"Said department shall be for the confinement of all male persons hereinafter committed to said hospital who have been discharged under the provisions of Sec. 2310-a12, Supplement of the Code, 1907, all male persons committed to said hospital who are found by the court making the order of commitment to be habitual inebriates or drug habituates; and any person committed to the hospital who, in the judgment of the board of control of state institutions acting upon

the recommendation of the superintendent, is believed to be a menace to the maintenance of the discipline of the hospital, and providing that patients of any department of the hospital who leave the institution or grounds thereof without due authority shall be subject to transfer to said custodial department upon the order of the superintendent of the hospital."

Section 3 (Sec. 2310-a35, Code Sup. 1913) provides:

"No person confined in the custodial department shall be released therefrom until he shall have remained a full term of three years."

There is no claim in this case that the plaintiff herein should be held under any of the provisions of chapter 184 of the laws of the Thirty-Fifth General Assembly. Nor is the right to hold her based upon any of the provisions of this chapter.

Upon a full consideration of this record, we are inclined to the opinion that the court did not err in discharging the plaintiff, and the cause, therefore, should be and is *Affirmed*.

WEAVER and EVANS, JJ., concur. SALINGER, J., specially concurs. LADD, J., concurs in the conclusions reached in the first division of the opinion; dissents as to the second division. DEEMER, C. J., and PRESTON, J., dissent.

SALINGER, J. (concurring). The importance of the questions decided, and a dissent which has been a progressive development by means of addition and subtraction, and as to which the members of the court have constantly changed in attitude, constrain me to state fully the ultimate conclusions which impel me to agree to the decision of the court, and also the reasoning upon which these conclusions are reached. My ultimate conclusions are:

1. When the officers of a state asylum detain a patient, the tribunals of the county in which the asylum is situated

are, of necessity, the ones nearest the detained patient. If the general provisions on venue that require all actions to be brought in the county wherein some defendant resides, or in which he does an official act, apply to an application in habeas corpus made by such patient, these statutes accomplish that all such applications must be made to the tribunal literally the nearest to the applicant. If that be the true construction of these general statutes, then Code Sec. 4420, which provides that application of habeas corpus "must be made to the tribunal most convenient to applicant in point of distance," has no effect whatever. On that construction, the words of this statute compel application to the tribunal "physically the nearest," a requirement already made by said general statutes. Therefore, I hold that Sec. 4420 is special and controls the general, and that a fair construction of all the statutes on the subject is that while, ordinarily, application must be made in the tribunal nearest to applicant, in habeas corpus, subject to proper guards against abuse, the application must be entertained in a tribunal which, though not physically the nearest, is found to be the most convenient in point of distance.

2. There is no evidence in this record that the tribunal selected by this applicant is not most convenient to her in point of distance; and, in any event, the respondent may not complain on appeal that the applicant was tried in a tribunal not most convenient to her.

3. On the authority of *Ware v. Sanders*, 146 Iowa, at 242, the point of improper forum was waived by producing the applicant.

4. Certain statutes provide for conditional release on parole, upon compliance with stated conditions. I am of opinion that, although one of these conditions is that a parole is obtainable only on the recommendation of the superintendent, this does not affect the jurisdiction of the courts to grant applications for discharge which invoke a statute other than the parole statutes, to wit, the one which provides that

"the term of the detention and treatment shall be until the patient is cured, and not exceeding three years." A parole is a conditional and experimental release before expiration of sentence. But the statute last referred to terminates the sentence whenever a cure occurs, though that be earlier than the maximum time. It follows that one who invokes this statute is not seeking a conditional release before termination of sentence, but is asserting that he is illegally detained because detained after his sentence has expired. Therefore, the parole statutes are not involved; for, though the courts have no power to grant a parole, and its granting depends upon the recommendation of the superintendent, they do have power to discharge one who is being imprisoned after the expiration of his sentence. If, as the minority claims, habeas corpus will not lie to liberate a detained inebriate, then the amendment to the habeas corpus statute which makes the requirements of the statute amended mandatory in applications "by an inmate of or one confined in a state institution" commits the absurdity of making mandatory regulations concerning an application which cannot be entertained at all.

DIVISION I.

I. The respondent superintendent detained applicant in Henry county by official act done therein. This writ was issued by the district court of Clayton county. If our general statutes on venue control, the minority is rightly of opinion that, initially, none other than the district court for Henry county had jurisdiction to entertain the application. A statute provision on venue requires that personal actions shall be brought in some county in which some defendant actually resides; and the further provision that this rules, "except as otherwise provided," confesses that the main enactment is not exclusive. (Sec. 3501, Code.) Another commands that actions which complain of an act done under color of public office must be brought in the county where that act or some part thereof was done. (Sec. 3494,

Code Sup. 1907.) When the superintendent of a state hospital detains a patient therein, the detention occurs in the county where the superintendent resides, and constitutes an official act done therein. Using the word "distance" literally, the tribunals that sit in that county are the least distant from a patient who seeks release by habeas corpus. If these two statutes provide that the county wherein the superintendent resides and detains the applicant is the only place wherein the application can be initiated, and physical nearness to the tribunal applied to is equivalent to "most convenient in point of distance to the applicant"—if, therefore, it be sound construction that habeas corpus must be applied for in the county where the superintendent resides and detains the applicant, and that this county is the most convenient to applicant in point of distance—it was a waste of words to enact Sec. 4420, which provides that the application "must be made to the court or judge most convenient in point of distance to the applicant." For, on such construction, Secs. 3494 and 3501 accomplish all that the words of 4420 can. If, literally, distance is the test, then the nearest tribunal is the proper one, whether it is or is not convenient. The only way in which the words of Sec. 4420 can have effect is to hold that nearest in distance may not be the most convenient in point of distance. Otherwise, "most convenient in point of distance" means, merely, in the county wherein the superintendent lives—a needless statute, because, without it, that is the only county in which application can be made. Again, the statute provision (Sec. 4419, Code) that the writ of habeas corpus "may be served in any part of the state" is useless, because there never can be occasion to make such service. No one can be detained unless someone is present to detain him. If the writ can be applied for only in a district wherein the detained person is, no writ need ever be issued to operate outside of that district. Construction which results in needlessly disregarding statutes *in pari materia* is not favored, of course, and it is such construction

that the minority declares for. It is clear that all the statutes on the subject may have effect, and that we should not be asked to repeal Secs. 4419 and 4420. Rightly construed, all together provide that, ordinarily, personal actions must be brought in the county where the defendant resides, or in which an official act complained of has been done; recognize that ordinarily the tribunals in such county are the most convenient to which the plaintiff is entitled, that in some instances these tribunals, even if literally the least distant, are not the most convenient to applicant in point of distance, and, therefore, provide, with proper guard against abuse of the practice, that courts may entertain habeas corpus, though other courts are nearer in literal distance, though the respondent does not live in the county wherein application is made, and though applicant be not detained therein. This I construe to be the holding of the majority, and agree to.

It is conceded that *Ware's Case*, 146 Iowa 233, says that which supports this position, but it is insisted that its "real decision" is merely that the jurisdiction of the Supreme Court is state-wide. The case expressly holds two things: (1) That as to the Supreme Court or a judge thereof, the statute requiring the application to be made to the tribunal most convenient to the applicant has no application, since the original jurisdiction of the Supreme Court is state-wide. (2) That, at all events, this statute does not expressly provide that the most convenient tribunal has exclusive jurisdiction, nor command the more remote judge to refuse the writ, because the statute is in this respect simply directory, and that, therefore, the writ may be granted by a tribunal not the one nearest to the petitioner.

In *Hamill v. Schlitz Brewing Co.*, 165 Iowa 266, we pass on the effect of a decision by us of a controversy in which it was contended: (1) There is no power, after the jury has returned a verdict and been discharged, to give the defeated party a judgment effecting in result what would be equivalent to directing verdict in his favor; and (2) under the

record, a directed verdict was in no event justified in the state of the evidence, even if it had been applied for before the power to grant it had lapsed. Both contentions were sustained in the decision which Hamill's case, *supra*, reviews. We hold that what was said on both heads is binding law, and not dictum. In other words, though it was unnecessary to go farther, after having held that there was no power to direct a verdict, adding that the evidence did not warrant such direction was a binding decision, and not a "mere dictum or gratuitous or irrelevant expression." Both on this authority and in reason, the "real decision" in the *Ware Case* was more than a decision that the Supreme Court has state-wide jurisdiction. It decides that habeas corpus can be entertained, though applied for in a tribunal not nearest to applicant.

The following is hornbook law: The test is whether a fact has been fully and fairly investigated and tried, and actually determined, or whether it is inferable from the judgment itself that it was determined. 2 Black, Judgments, Sec. 614, approved in *Reynolds v. Lyon County*, 121 Iowa 733, 742, 743. Every point which has been either expressly or by necessary implication in issue, or which must necessarily have been decided in order to support the judgment or decree, is concluded. Freeman, Judgments, Sec. 257. An estoppel beyond what appears on the face of a judgment applies to every allegation which, having been made on the one side and denied on the other, was at issue and determined in the course of the proceedings. *Stevens v. Hughes*, 31 Pa. St. 381.

In the *Ware Case*, the express challenge was not that the Supreme Court lacked state-wide jurisdiction, but that it was not the tribunal most convenient in point of distance to the applicant. That this court is not contemplated by the statute which requires the tribunal to be the one most convenient to the applicant in point of distance, because the jurisdiction of the court is state-wide, is one good answer to this challenge. It is manifestly just as good an answer that,

even if the court did not have state-wide jurisdiction, its jurisdiction was not well challenged because the statute which permits application to be made to the most convenient tribunal is, at most, directory. Not only is the latter a decision because it is an express declaration upon an express challenge interposed, but it can and must be inferred from the judgment that such ruling was made, and of necessity. The challenge was that the court lacked jurisdiction. Both by retaining the application, and in express terms, this contention is overruled. This ruling is the ultimate decision. For such ruling two reasons, equally cogent and relevant, are assigned: first, that the statute in question has no application; second, that if it has, it is merely directory. Both are reasons for an ultimate decision rather than the decision itself. Why the stating of one of these reasons is more the real decision than the other is difficult to apprehend. If the claim asserted by the minority be followed to its bitter end, then the only ultimate decision ever pronounced by a court of last resort is that there shall ensue either affirmance or reversal. If that be so, if the reasons, and all or either of them, for affirming and reversing must be treated as dictum, if the only effect of our decisions is their final result, if there is no function for the announced reasons that underlie and induce the judgments of courts of last resort, and if the reasons assigned for the decision, though relevant and cogent, are mere words, there is no occasion to publish official reports of such decisions.

2.

The hyper-analysis used to minimize the *Ware Case* is in sharp contrast with the plenary effect arbitrarily given to cases relied on by the minority. Whether the one restrained must present the application to a judge in the district of the restraint, or, that being impossible, to the nearest judge who will act, was neither involved nor even discussed in *Thompson v. Oglesby*, 42 Iowa 598. The sole question was whether one

who presented the application of the person restrained was in such sense the applicant as that venue lay with the tribunal most convenient to this presenter. The case was determined in this court upon the concession that, if the presenter "is not the applicant within the meaning of the statute, the motion for change of venue should have been granted." Upon this concession, the only question that could be decided was whether such presenter is such applicant; and all that is decided is that he is not. Some language to the effect that when it may be presumed that respondent and the person restrained are together, and so, that the evidence as to the legality of the restraint would ordinarily be in the same place, then, for the benefit of the one restrained, it should be allowable to show the illegal restraint with the least trouble and expense, is pure dictum, and inapplicable besides. The real decision is further made clear by what follows this dictum, to wit: That "there is no reason why his imprisonment should continue until he can be brought before some remote court or judge, wherever *some person may happen to be who desires to present a petition in his behalf.*"

In *Rivers v. Mitchell*, 57 Iowa 193, 195, the wife lived in Oskaloosa, the husband in Des Moines. The application was made to a judge in Polk county and the point was made that there was no jurisdiction to issue the writ because the application was not made to the court or judge most convenient in point of distance to the applicant. It is held that the children were, in a sense, the applicant, and it would be presumed that they and the father were together, and upon this point the *Thompson Case*, *supra*, is cited.

On suggestion that to do so is important, I have carefully considered the case of *Laird Bros. v. Dickerson*, 40 Iowa 665. It decides that if, on an attachment against a non-resident, no property is found in the county wherein suit is brought and the venue is changed to a county wherein a levy is made, the levy is valid from its date, and it is said that, except as the manner of its jurisdiction is prescribed by

statute, both by the Constitution and statute the district court "has jurisdiction over every cause *brought* within its district," and that "this idea of the general and unlimited jurisdiction of the district court is further illustrated by the fact that they are styled the district court for the state, . . . with authority to grant writs running into any part of the state. . . . It is therefore clear, . . . that the district courts have general jurisdiction of all matters brought before them." This is not a decision that the court might not err as to venue, but it does hold that there is jurisdiction of a case brought in the wrong county, that there is power to issue some writs running to any county in the state, and is a strong implication that when the writ may thus run, it may have important bearing on whether venue has been rightly laid. While not an exact authority for the ruling opinion, it is none for the dissent, and tends to militate against rather than to sustain it.

In re Jewett, (Kan.) 77 Pac. 567, holds that, where a Constitution gives district courts such "jurisdiction as may be provided by law," the exercise of such jurisdiction is limited to "within their respective districts," and where there is no provision to serve writ or process in any county of the state except in *criminal* cases, there is no jurisdiction to order the writ of habeas corpus to run outside the district. This is merely a decision that habeas corpus cases are not criminal cases, and the case *says* that the only question is "whether a proceeding in habeas corpus is in its nature civil or criminal." In treating this as applicable, our statute, which allows the writ to be served in any county of the state, is overlooked.

In re Doll, 50 N. W. (Minn.) 607, is this: Under a statute provision that the person applying for the writ must apply to a court or judge in the county where he is restrained, if there be one therein willing and capable to act; that if there are none in that county, application must be made to the nearest or most accessible court or judge capable and

willing to act; that if the application be made to one not in the county of the restraint, proof is required that there be none in that county willing and able to act, and that the more remote tribunal applied to shall deny the application unless such proof is made, it is held that without such proof it is error to entertain the application outside of the county of the restraint. This rule is in a general way followed in *Ex parte Ellis*, 11 Cal. 222, 225, and the statute there is merely that writ may be granted by certain named judges. Neither Kansas, Minnesota, nor California have statutes which authorize habeas corpus to be brought where it is most convenient in distance to the applicant, or permitting the writ to run into any part of the state.

College of Physicians v. Guilbert, 100 Iowa 213, was a proceeding to compel the state board of medical examiners to recognize a medical school as being in good standing. Writ of certiorari was resorted to to compel this action, and obtained in a county in which the act complained of was not done, and in which the officers charged with doing same did not reside. The case, therefore, decided rightly that the writ was not warranted. It is not applicable here, because there is no statute provision that the writ of certiorari may be obtained of a tribunal most convenient to applicant in point of distance; because there is no statute like Sec. 4419, under which writ of certiorari may, like habeas corpus, be served in any part of the state; and because the only statute provision as to certiorari is Sec. 4155, Code, that this writ "may be granted by the district court or judge thereof."

Ex parte Clarke, 100 U. S. 399, and *Ex parte Virginia*, *idem*, 339, but hold that when the writ of habeas corpus is directed to an inferior court by the Supreme Court of the United States, it involves appellate review, and that appellate courts are authorized to issue it by exercise of either original or appellate jurisdiction.

State ex rel. Durner v. Huegin, 85 N. W. (Wis.) 1046, as to which the minority say that it "is also quite closely in

point," holds that, for the purpose of review as to who are adversative parties,—or plaintiff and defendant, no matter how named,—as to what counsel may be paid by the state, and in settling what is *res judicata*, a habeas corpus proceeding is civil and not criminal.

Sec. 260, Code, cited, deals with the superior court, and provides that "said court shall have jurisdiction concurrent with the district court in all civil matters," except some excluded in terms.

Barranger v. Baum, 30 S. E. (Ga.) 524, says nothing about habeas corpus, except that it is an extraordinary remedy within the purview of statutes which prescribe the time for filing bill of exceptions in suits which seek an extraordinary remedy; and that where an extradition warrant is asked, petitioner may show on habeas corpus that he has given bond in bail trover for goods involved in the criminal charge upon which the warrant is demanded.

Surely none of these make clear that the voice of authority is against entertaining habeas corpus as was done below.

II. The dissent presents the following arguments (stated in ultimate effect) why the statute should be construed to limit entertaining the application to the tribunal nearest to applicant. Roughly, these arguments are: (1) Opportunity for harassment of respondent by captiously selecting a tribunal at great distance, which, as is claimed, the judge has no power to deal with because he cannot refuse the writ. (2) Hardship or expense, or both, to respondent and witnesses. (3) There is no adequate review, if any. (4) It has been the custom of the Supreme Court to send such application to the tribunal nearest to applicant.

As to the last, the general statutes on venue contemplate that, unless special provision be made, all actions, and, consequently, all complaints of official action, must be prosecuted in the tribunal nearest to the impleaded official. Therefore, if a special provision is made that a particular complaint shall be presented where it "is most convenient in point of

distance to applicant," these words are not repealed because the Supreme Court has sent applications which comply with these words to a district court nearest to applicant. And, for all that appears, the particular courts to which such transfers have been made were not only nearest to applicant, but, as well, "most convenient in distance." If sending such an application away proves that the statute under consideration has no effect, it can be as well argued that the transfer repeals the law which authorizes the Supreme Court to entertain habeas corpus.

2.

As to the claim that, in details specified, such great hardships will follow our construction as that it should be held that the legislature meant nothing by the words it put into Sec. 4420, I am of opinion that most of these hardships are fancied; that as much hardship will result from adopting the construction favored by the minority; that if any burdens are created by the view of the majority, the legislature must have foreseen them; and that clear words in a statute should not be cancelled because their natural effect is to produce consequences anticipated by the body that employed such words. I think what has just been said is applicable to most of the arguments advanced by the minority, which have not as yet been referred to. These are:

a. As to the statement that the patient will be encouraged to bring as many applications as he can induce attorneys to institute, and he or his friends may be able to finance, and this as a method of obtaining a release without the burdens attached to release or parole—As will be shown later, an application to be discharged because cured is not one for, and if granted does not obtain, a parole. Hence, the construction of the majority will not enable one to use an application like the one at bar as a means of getting a parole. A patient may vex officers by repeated applications, whether venue lies in

one county or another. However, the average inmate of an asylum is hardly in position to finance any such applications.

b. The argument that allowing application to a tribunal literally not the nearest might "perhaps" be a burdensome expense to the state, and, certainly, upon respondents who are not rich, is met in part by the minority which makes such argument with the statement that "attendance in the supposed case is compulsory." And, as will be later pointed out, witnesses might have to go a greater distance to attend upon a court in the county where the superintendent lives than if the inquiry were held in some other county.

c. It is claimed that under our construction actions may be brought in remote counties though "there be no shadow of excuse" for proceeding there; that, if the plain words of the statute be given effect, it will be possible "for some worthless vagabond of a father" to call the mother to defend her rightful custody of their child in the most remote of counties, by his merely alleging that he and his witnesses live there, and that it is most convenient for him as a place of trial; that the court or judge has no discretion and must entertain such application, and is subject to a penalty if he refuse; that, therefore, no review of the right to apply exists below, and that there is no adequate appellate review. I answer that, if the construction of the minority ruled, these applications would have to be made in the county of respondent's residence; that, therefore, there could be no review anywhere else, no matter how much hardship the making application in that one county would create; that, as will presently appear, trial in that county might be much more burdensome than if held in some other county; and that for the rest, the premise is faulty, and the deduction irrelevant. There is no law which penalizes the judge who rightly denies the writ of habeas corpus and the minority itself suggests that there may be a transfer of the application or a quashing of the writ issued—which, of course, presupposes review. As will be seen presently, review below is not only permitted but imposed. So far as review

on appeal is concerned, that is, under well-settled rules, far from plenary. But it is as full as appellate review of the kindred acts of denying or granting a change of venue, and, surely, if review of an act authorized by statute is inadequate, additional legislation, rather than judicial amendment or repeal, is the remedy. The minority errs in the premise that the courts have no power of review, and in the deduction that they will not refuse to entertain applications wrongfully made in a more remote county,—that they will hold a tribunal to be most convenient in point of distance to applicant when that is not true. All this simply overlooks the statute contemplating a judicial inquiry into whether the tribunal selected is the one authorized by statute, in that it provides that if the one selected be not the one most convenient in point of distance, the application shall not be entertained unless a satisfactory showing be made which excuses the selecting of the less convenient court or judge. It also ignores the foundation upon which the administration of justice must rest, to wit, the presumption that the judges of the land will not entertain applications where the selection of the tribunal is not warranted by statute, is purely captious, made with evil intent, and is without “shadow of excuse.”

d. The statement, that “whether she was cured or not was not within the knowledge of persons living within Clayton county; for it is conclusively adjudged (in that county) that where they knew her she was addicted to the drug habit and should be confined in an asylum” either means nothing whatsoever or else asserts that, if one is an inhabitant of a county wherein a patient is adjudged fit for detention, he can never have knowledge that the person there committed has been cured. This ignores that whatever was adjudicated in Clayton county binds equally the inhabitants of all the counties. And it makes the impossible claim that the inhabitants of a county wherein a patient is adjudged to go to an asylum can get no knowledge that the person committed has later been cured. In the same case is the statement that “no one but witnesses

who saw her after she had been taken to Mr. Pleasant could give any opinion as to her recovery ; so that not only the parties but the witnesses were at Mt. Pleasant." If one concede that none but witnesses who saw applicant after she had been taken to Mt. Pleasant could give an opinion as to her recovery, I know of no law which prohibits people who live in Clayton county from seeing her while in Mt. Pleasant.

e. A thought already expressed may properly be amplified in this connection. Since general statutes provide that all applications must be brought in the county wherein the respondent lives, the legislature must have foreseen that the special provision, that a particular application should be brought in the county most convenient in point of distance to the applicant, would probably be understood to provide for cases in which courts might entertain the application on the ground that it was most convenient to applicant in point of distance, although not the nearest in distance. It must have been known that the arrangement of railroad service and the location of witnesses might make the tribunal nearest in an air line more inconvenient than one not so near in distance physically. In foreseeing this, is included anticipating that applications might be made before tribunals not most convenient in point of distance,—that there is opportunity to institute vexatious litigation and impose burdensome expense, and other hardships. When, therefore, in the knowledge that either or all of these might happen, the legislature made this specific statute covering particular cases, and additional to general statutes, construction should not make this special provision idle, nor deal with the general statute as though no addition thereto existed, merely because there might result under this special statute what the legislature must have foreseen would, or might, follow its enactment.

f. If the tribunal applied to is "most convenient in point of distance to the applicant," it is not material, were it true, that trying the application before such tribunal is, in some regards, greatly more burdensome than would be trial before

some other. If obeying the statute creates avoidable and undue hardship, the remedy must come from the legislature. The judiciary is limited to inquiry whether the tribunal selected is most convenient to applicant in point of distance. The vital question for the court is what provision the legislature has made, not whether it might have made a better one. But it is not true that no hardships will follow on the construction favored by the minority. Most convenient to applicant involves (1) the distance he must travel, (2) the convenience of that travel, in the sense that a court more miles away may be more readily accessible than one not so many miles away, and (3)—as is strongly intimated in *Thompson's Case, supra*—where applicant's friends and witnesses are. We take judicial notice that courts and judges act in county seats, and that it may be much more difficult to reach the seat of the county in which some of the parties live than to reach some other county seat. The friends and witnesses of applicant may be so located as that some county other than the one in which respondent lives may be most convenient in point of distance, i. e., the distance these must travel. If the majority is right in holding that only those who saw the patient in the hospital can testify as to his recovery, hardship would surely result from giving the tribunals of the county wherein the hospital is exclusive jurisdiction in a case where all who had there seen him, except the respondent and his subordinates, always lived in or had removed to a part of the state remote from the hospital.

If we follow the elementary rule affirmed by the *Ware Case*, that, in determining whether procedure in habeas corpus is valid, we should not construe "with overtechnical nicety," and that everything which is "ambiguous or doubtful should be interpreted liberally to promote the effectiveness of the proceeding," it is not difficult to find that the legislature had a substantial reason for this exceptional and clear statute. The very reasons which ordinarily make it a hardship to litigate in courts held in counties in which defendant does not reside are reasons for letting the convenience of the applicant

in habeas corpus determine the forum. The superintendent or physician is not at home in the asylum in the ordinary sense of home. He defends for the state, and the state is not a stranger in any of its courts. If it is permissible to presume that local sentiment may be hostile to the state, then it should be arranged that all indictments be tried at some spot, as nearly central to all the inhabitants of the state as possible, where the state has no enemies. On the other hand, the hospital town is not the home of the patient. That patient may be a child whose home, friends and evidence are far from the place of detention. In many, if not in most cases, evidence and help to establish the right to liberty may, as seen, be found in some place other than the county in which the institution is. Have we the right to annul the legislative will which so plainly desired to give the patient an opportunity to overcome a handicap—to permit him to make his struggle for freedom where he thought conditions the most favorable?

III. By a statute requiring applications in habeas corpus to be made to the tribunal most convenient to applicant in point of distance, although other statutes provide that actions, generally, must be prosecuted in those that are physically nearest, and by enacting that the tribunal applied to may refuse the writ unless applying to the more remote court is well excused, the legislature recognizes that judicial inquiry may be necessary to determine whether application had been made to the proper court—whether the tribunals of the county in which respondent lived were or were not the ones most convenient to applicant in the sense of the statute. We said in *Ware's Case, supra*, that “the phrase ‘convenient in point of distance’ is one of quite indefinite meaning, and often might reasonably be applied to any one of several judges residing in different localities.” It is clear, then, that whether the tribunal applied to meets the requirements of this special statute is a pure question of fact. By entertaining the application, the trial court resolved this question of fact in favor

of the position that the tribunal selected was most convenient to applicant in point of distance. This being so, there are two reasons, resting on accepted rules of practice, for not disturbing this finding: (1) Such finding of fact, ordinarily, concludes us, and no evidence was put in to support a claim that the court applied to was not the one so most convenient. (2) The respondent may not complain that the court selected by applicant was not the one so most convenient to applicant. While the court may decline the writ if proper excuse is not made for bringing the application in the more remote county, error in retaining the application avails only those who are injured thereby. This statute is for the benefit of applicant, and does not consider the convenience of respondent. He may not complain that applicant went before a court less convenient to him than he might have selected. The respondent is not harmed because his adversary was content with less than the law gave.

IV. As the minority concedes that the amendment of Sec. 4420 by Acts Thirty-fifth General Assembly, Ch. 293, does not affect this appeal, there would seem to be no occasion to refer to this amendment. But it is so misconstrued as that, for the benefit of future litigation, such construction should not go unchallenged. And the view taken of the effect of statute amendment on decisions upon which the amendment does not operate is such as that approval by silence would endorse an utter confusion of the relations between the legislative and judicial departments. The amendment referred to makes two changes: (1) compels the refusal of the writ if application be not made to the tribunal most convenient to applicant in point of distance. Before, such refusal was discretionary. (2) On the question whether a case exists for retaining the application, though the tribunal is not thus most convenient, no consideration is to be given to the convenience or preference of attorneys, witnesses, or other persons interested in the release of applicant. An amendment that an application must be denied unless good reason be shown for

entertaining it in a tribunal not most convenient to applicant in point of distance, and defining what is not a sufficient reason for entertaining an application made to a tribunal not thus convenient, manifestly works no change whatever in the statute which, in express terms, puts the venue with the tribunal thus most convenient. The amendment is wholly confined to what shall be done if application is made to a tribunal not so most convenient. The tribunal which is thus convenient remains the proper one.

The dissent proceeds on the assumption that said amendment has relieved the people of the state from various alleged oppressions possible under a construction which allows an inmate of a state institution to bring habeas corpus where the statute says he may. It congratulates the legislature upon "this providential act"—providential because of the fancied relief given superintendents of state institutions. Mingled with this felicitation upon what, as seen, the legislature has not yet done, is regret that the imagined relief given to such officers was not extended to all respondents in habeas corpus; and thus the dissent justifies itself with the statement that none would have been written had the legislature done its whole duty. The minority assumes that this imagined and lauded relief was given to cure in part the evils arising from the views of the majority—views not announced when the legislature acted. Upon this is based the hope that, under the spur of this dissent, the assembly will complete what has not yet been begun.

But just how is this judicial pronouncement justified, or proper, or relevant, if the legislature had acted as the dissent asserts? If the legislature thought it proper or necessary to amend the statute under consideration, that was its right. Such amendment may prove that an amendment was needed to make the law what the minority asserts we should declare it to be without reference to amendment. But the amending of a statute is surely no reason why the Supreme Court should have done the amending, and beaten the General Assembly in

a race at law making. If the legislature has by amendment given certain officers an immunity, it must be assumed that it needed the act of the legislature to create such immunity; the Supreme Court is not to create it. In the last analysis, the dissent is a criticism upon the court for the failure to anticipate by decision what the legislature has finally done by enactment. It is hardly the accepted understanding of the functions of courts of last resort that they are to relieve the legislative department from making such amendment to statute law as it may develop is needed.

V. All questions of whether this application was entertained in the proper forum have, on the authority of the *Ware Case*, 146 Iowa, at 242, been waived by the fact that the respondent appeared to the writ and produced the patient. In that case we said:

“In the last cited case (*Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S. E. 780), where question was raised whether the particular judge issuing the writ should have entertained the proceeding, it was held that, as the party against whom the writ issued appeared and produced the petitioner and pleaded to the petition, objection to the propriety of the judge's action should be overruled. The same principle appears to be affirmed in *Broomhead v. Chisolm*, 47 Ga. 390; Church on Habeas Corpus, Sec. 156; *Re Ross*, 3 Practice Reports (Can.) 301. In the *Broomhead Case* the court, responding to an objection to the jurisdiction, said that whatever might have been the decision had the respondent declined to produce the prisoner, it was unnecessary to consider, for, ‘having brought him before the judge in obedience to the writ, we are not disposed to scan too critically the mode in which he got there, but hold that being there, the judge had authority to pass such order as the nature of the case demanded.’ ”

DIVISION II.

As the result of a laborious analysis of numerous statutes, the minority finds that female inebriates are received

at either of the hospitals for the insane, while male inebriates are received in the institution at Knoxville alone; that the statute which allows release before expiration of term applies to the institution of Knoxville only, and declares upon these findings that it was a mistake to commit the applicant for a term which could be shortened or suspended, and that the sentence erroneously imposed on her should be treated as a definite sentence for not less than one nor more than three years, a sentence authorized by a statute under which she was not committed. If what the minority says is to have any effect, it is its ultimate conclusion: (1) That the legislature intended to make it possible for a woman to be detained after she was cured, while the term imposed upon the male could at least be suspended by parole upon the mere belief that he appeared to be cured. (2) That while, where a statute is not applicable to women, they may not use its provision to gain freedom, such statute is, however, effective to put them into and keep them in detention.

It is the fact, and at one stage of its evolution the dissent admitted, that no question is made as to the propriety of the commitment. Under it the superintendent took and keeps applicant. Surely, one who is imprisoned may invoke the law under which the detention is justified, in testing the legality of his detention. See *Jones v. McClaghry*, 169 Iowa 281. If this be not permitted, and if the sentence is not warranted by the statute under which it is ordered and is being executed, then the writ must be sustained without consideration of who can discharge a patient rightly committed; because, of course, habeas corpus lies to liberate one who is detained under a law which does not apply to him—upon a commitment which has no law to rest upon. But because a distinction as to who may be paroled is utterly arbitrary if based upon difference in sex, I am firmly persuaded that the legislature did not intend to make such distinction. One cannot conceive why a woman, and not a man, should be detained for a fixed term, without provision for liberation if sooner cured. To construe the law

thus is to disregard the elementary rule declared in *Ware's Case, supra*, that in dealing with habeas corpus, or other remedies in aid of liberty, the construction should not exhibit "overttechnical nicety," but should be one that is "liberal and calculated to promote the effectiveness of the proceeding."

II. The statute under which the application at bar is made provides that "the term of detention and treatment shall be until cured, not exceeding three years"; other statutes, that there may be conditional release upon the recommendation of certain hospital officers, and before it has been determined there has been a cure, if (1) there is apparent cure, or (2) if these officers believe there has been a cure. The dissent points out, rightly, that habeas corpus will not lie unless the applicant be entitled to unconditional and absolute release, a release without any of the safeguards thrown about the granting of parole. It is urged there should be no unconditional release because it can never be known except by long continued conduct that there has been a cure; that no release by the court is in any view warranted unless the conditions are exacted for which the parole statute provides; that if, on application for absolute discharge, the court would find no more than an apparent cure, a complication would arise on whether, upon such finding, the hospital officers must give a parole. The question is asked whether it is possible there can be full release in one case and conditional in another. It is said the difference between actual cure, apparent cure, and cases wherein the superintendent believes there is a cure is too refined for distinction, and argued that, if the court had any jurisdiction to release, all applications for release are for the court, and that this destroys the conditional release provided upon recommendation by the hospital officers. The ultimate argument made, in terms, is that the contrary is true; that there can be no release by the court, and the hospital officers alone can act either upon apparent or actual cure.

I shall attempt to show presently that all this rests upon the misconception that one who applies for liberation because

detained after cure has ended his sentence is applying for a parole. For present purposes, it suffices to say that, if the courts have *no* power to determine on habeas corpus whether an inebriate is being unlawfully detained at the state hospital, it will have to be explained what the legislature meant by Ch. 293, Thirty-fifth General Assembly, wherein it amended the habeas corpus statute by making the provisions of that statute mandatory in all cases where "the applicant is an inmate of or confined in a state institution." The amendment makes no exception, and surely one committed as an inebriate is "an inmate of or confined in a state institution." If habeas corpus may, under no circumstances, be resorted to by an inebriate thus confined, what occasion was there for a provision that as to him the requirements of the statute on applications for habeas corpus *must* be followed?

2.

The statute under which applicant was committed enacts that the "term of detention and treatment shall be until cured, not exceeding three years." Self-evidently, this contemplates that rightful detention is at an end whenever the patient is "cured." The gravamen of the application here is detention after cure. Other statutes provide for releases of patients "whom the superintendent believes to be cured," or so much improved as to make their release on trial advisable; and so if "after thirty days' treatment and detention a patient shall appear to be cured." Notwithstanding the assertion of the dissent that the legislature makes no perceivable distinction between a cure and an apparent cure, and that when the superintendent believes there is an apparent cure this is in his mind equivalent to actual cure, it is perfectly manifest that the legislature has made a clearly expressed distinction between cases of actual cure and those where the superintendent believes a cure exists, or where the patient "shall appear to be cured." The very words used in the statutes

prove that such distinction is made, more clearly than any argument can.

Under the Constitution, and Sec. 225 of the Code, the district court has "general, original and exclusive jurisdiction of all actions, proceedings and remedies, except in cases where concurrent or exclusive jurisdiction is *conferred* upon some other tribunal." Whether, under this, it was necessary to give the district court jurisdiction in habeas corpus needs no consideration because it is elsewhere expressly given such jurisdiction; and the grant is exclusive, except that the Supreme Court, its judges, and those of superior courts are also given such jurisdiction. As habeas corpus can be entertained by the district court, and as it is the proper remedy for one who is illegally imprisoned with or without form of law (*Express Company v. Lynch*, 65 Ga. 240, 245; *Barranger's Case*, 30 S. E. (Ga.) at 527, left col.), it follows that, unless some statute has made an exception, the district court has power to discharge one who is illegally detained in a state institution. And as the officers of such institutions have no inherent power to make judicial investigations, and to release patients as their result, it follows, also, that as to such officers the power to release a patient is exclusively in the district court, unless some statute has given these officers either exclusive or concurrent authority. That certain statutes hereafter discussed give such powers in some cases is true, and it may be assumed that, in so far as power is conferred at all, it is exclusive. But as the court has power to act in the particular case at bar unless same has been exclusively conferred upon officers of state hospitals, the exact question is whether this has been done. Now while the statute says that the term shall end when the patient is cured, it does not say who shall determine whether a cure has occurred before the maximum time of the commitment has expired. Such silence authorizes the district court to make such inquiry and no silence can authorize said ministerial officers to make it. This particular statute, then, gives the court power to act, and no

power to said officers. If the court does not possess this power, it must, as said, be due to the fact that other statute provisions deprive it of that power. In varied ways, the minority insists that the so-called parole statutes divest the court of power on habeas corpus to say that an actual cure has occurred, and that, therefore, detention is unlawful. The remaining question is whether said statutes have any reference to release for actual cure. If these make all releases dependent upon recommendation by the hospital officers, and the exactment of certain conditions, then the trial court erred; otherwise its decision is right. One statute needs little consideration on this inquiry: it provides that the board of control may discharge persons committed on recommendation of the superintendent "when satisfied that such person will not receive substantial benefit from further hospital treatment." (Ch. 119, Thirty-second General Assembly.) Certainly, this does not deal with cases of cure, but contemplates rather those in which cure is found to be hopeless. Other provision is that, upon signing prescribed pledge, making report and other conditions, and with provision for return on breach of pledge, or failure to observe conditions, any patient may be "paroled" if the superintendent believes him to be cured, or so much improved as to make his release on trial advisable. (Ch. 185, Thirty-fifth General Assembly.) The only other provision permits parole by the governor on the recommendation of the physician in charge and superintendent, and on similar conditions and pledges, in cases where the patient shall appear to be cured after thirty days' treatment and detention. Beyond question, these authorize a parole on recommendation of these officers, and the exacting of said conditions in all cases where the superintendent believes a cure exists, or there is so much improvement as to make release on trial advisable, and where the patient "shall appear to be cured." But the power thus given confers only what it gives. It deals with experiments in cases wherein it is merely possible that a cure has occurred, and makes provision for summarily curing the

error if the conditional discharge prove an error. These do not pretend to negative that a patient may be actually cured, and do not intend to cancel the other statute which deals with cure only, and ends the term upon cure. The parole statutes no more give exclusive authority, or any authority, that said officers may determine whether there has been an absolute cure, and, therefore, a warrant for absolute discharge, than giving the board of control the power to issue a parole takes from the governor the power to issue a full pardon.

3.

The essential error of the minority is confusing an application for parole with one which asserts that the applicant is being detained after his sentence has expired, and holding thereupon that a statute which contemplates that the sentence has expired when a cure occurs, and fixes a maximum imprisonment of three years, has the same function as statutes which allow an experimental release before sentence has expired. The statute invoked by applicant does not commit for three years, but until cured,—is not a law that cure fails to terminate the sentence short of three years, but that, whether cured or not, the state will carry the burden not more than three years. Were it *conceded* that the patient has in fact been cured after the lapse of but one year, it would follow that the detention had ended, and that subsequent confinement was illegal. The essence of parole and kindred statutes is that they involve an optional clemency. To an act which one may do or refuse to do, the condition may be attached that it will be done only if named persons so recommend. When one of whom relief is sought which is optional attaches conditions the most unreasonable, all the seeker can do is to abandon his quest. But those who seek release under the statute at bar are not asking clemency. They are not asking an optional shortening of sentence. They urge, and I think rightly, that their term ends whenever cured, and that the three years' maximum is an administrative provision to re-

lieve the state if treatment for three years fails to get a cure; that they are cured, and are being unlawfully restrained because detained after their sentence has expired.

4.

Unless we may presume that judges will not act honestly and intelligently, the fact that hospital officers will deal with conditional releases honestly, and under the guidance of professional skill, furnishes no argument for taking from judges the power to determine whether there should be an absolute release. It might be a wise law that certain questions should be decided by experts, but the most we have is a rule that in some cases the testimony of experts is entitled to special weight. In no instance has power to act judicially been taken from courts on the ground that ministerial officers can give a wiser decision. If it is all wrong that the mere "belief of the trial judge" that a patient is cured may liberate such patient, it should be made impossible to grant a directed verdict discharging one accused of murder on the ground that the judge believes the evidence fails to show guilt. The statute which contemplates absolute discharge upon proof of cure may be lame in failing to provide for the possibility that such release may prove unjustified, but that is for the legislature. It may be said in passing that the minority rests itself not upon the fact that the judge discharges without providing for recaption, but upon the ground that nothing but the judgment of the hospital officials justifies a discharge, and that neither courts nor judges are given power by statute to review their judgment or belief. In other words, if the ministerial officers released on the conclusion that there was an absolute cure, the failure to provide for recaption would not be considered very material. But, after all, any error in absolute release can be cured by a new commitment, which is more than can be said if one tried for felony be erroneously discharged. Of course, it would be ideal if courts never erred, but absolute freedom from error would not result from allowing all cases

to be decided by experts. If jurisdiction depended upon proof that the courts had expert knowledge, and were infallible, they would rarely have power to act.

The statute which permits judicial inquiry on whether sanity has been restored is at least one instance wherein the legislature thought courts fit to investigate mental condition, and did not feel impelled to leave such inquiry to superintendents and physicians. True, this statute does not refer to inebriates. But the claim that any construction is wrong unless it give the expert exclusive judicial power is weakened by the fact that, in the one instance at least, the legislature, in express terms, left the determination of mental condition to the courts. Can it be that the legislature did not intend to trust anyone but a doctor or superintendent with determining whether an inebriate had been cured, unless so much of an inebriate as to have been committed for being insane?

5.

Statements that certain ministerial officers alone have power to release, provided there be "absence of fraud, or want of good faith," or unless it appears that the failure or refusal to recommend a discharge was fraudulent or corrupt, or unless, in spite of proper conditions, a parole was refused, are less a successful avoidance than a confession of untenable argument. If the legislature has conferred on certain officers the exclusive authority to release, the motives and the propriety of the conduct of the tribunal so clothed with exclusive authority are quite immaterial. In that state of the law, the courts have no power to grant relief, although the only ones authorized to grant it have improperly or unjustifiably denied it. For, when the legislature entrusts a function exclusively to an officer, it creates a conclusive presumption, binding on all other tribunals, that those alone authorized to act will act rightly. Their motives and conduct and omissions can be dealt with only by a change of officials and the change can but substitute others equally beyond control. If the minority

is right, then though the patient be as sound as any mentally, and though the officers testify upon compulsion, by subpoena, that the patient is cured, he may not be released on habeas corpus because these officers have not formulated what they testify to into an official recommendation and a release.

III. The minority urges that unless we construe the statutes as a whole to provide that no patient can be released except upon recommendation by the officers who detain him, these officers would be "involved in constant litigation," and liable to be haled into court at any time to have a judge determine whether the applicant appeared to be cured; that such patients are of sound mind and generally have friends to help them; that these will make it very unpleasant for the officials; that the judges in the districts in which the hospitals are located will "have their hands full in hearing habeas corpus actions"; and, also, that the officials will be greatly harassed by applications made in remote parts of the state, brought without attempt first to obtain a parole; and that the decision upon such applications is beyond review. That there is review has been shown, and that, if same be inadequate, the legislature must enlarge it has already been said, and is manifestly true. If the officials are threatened with harassment and the judges will be burdened because patients are allowed to apply for discharge to a court, certainly that will be true to even greater degree of applications made in the county of the detention. Such burden will be lighter if distributed than if centered. Passing whether patients committed as inebriates are usually prepared to indulge in expensive captious litigation, the "friends" will more readily finance repeated applications that can be made cheaply than those brought at a great distance from where the trial is in truth most convenient. Granting that habeas corpus will lie at all, the argument based upon the possibility of vexatious repetitions of the application is irrelevant. This court and many others are committed to the doctrine that vexatious litigation will not be enjoined, nor damages allowed because

such is instituted, even when the promoter is insolvent. *Gray v. Coan*, 36 Iowa 296. Code Sec. 2306 provides that persons confined for being insane may re-bring habeas corpus after their sanity is denied by decision on an earlier application. While it is true that the statutes dealing with insanity do not refer to inebriates, yet such statute as to habeas corpus sought by one detained as insane is relevant to meet the argument that the legislature never enacts legislation which can make vexatious litigation possible. At least this one statute expressly permits repeated inquiry into mental condition. Therefore, the bare possibility that, under one construction of another statute, repeated investigation of whether an inebriate is cured is possible does not prove that the legislature did not intend such construction. If, as I believe, the statutes under consideration are not ambiguous, then it is immaterial that hardships may result from their enforcement. Of course, such consequences are to be considered if statutes that make them possible are not clear.

IV. As the legislature has not given hospital officers any power to decide whether an absolute release shall be granted because an absolute cure has occurred, the question whether the Constitution permits such power to be given should not, under well-settled and salutary rules, be discussed. But since the Constitution is invoked for the argument that, as parole laws are constitutional, the giving to ministerial officers power which makes it possible for them to keep a cured patient under detention is also constitutional, I feel impelled to say this: That one law is valid does not necessarily establish the validity of any other law, unless their effect and general scope are substantially the same. I have already pointed out that an application for parole and one for unconditional discharge upon allegation of complete cure are essentially different. I may add that a statute giving ministerial officers exclusive judicial power to detain one after his term is ended, thus prohibiting review of the act by the courts of the land, would deny due process of law on at least two grounds: (1) Every

definition of "due process" includes action by a tribunal competent to act. These officers can act, if at all, on specific grant only. There is none, specific or otherwise. (2) It seems to me the legislature cannot say that the courts have no power to determine by habeas corpus, or some other sanctioned judicial procedure, whether there is an illegal restraint, and to liberate one found to be so restrained, and that to turn this power over to boards of control, asylum superintendents or asylum physicians also denies due process.

If such power to liberate cannot be taken away, and, at any rate, where it has not been attempted to take it away, the courts have power to inquire whether one confined under the statute at bar has been cured. This is an inquiry which lies in the path of whether there be detention after the term. Therefore, by inherent right, constitutional grant, general statute grants, and the grant of power to sit in habeas corpus, the trial judge committed no error in construing and applying this statute, and in asserting the right to liberate the applicant if it were found she was cured at the time she applied.

DEEMER, C. J. (dissenting).—I. The conclusion reached by the majority is fraught with such vital consequences that I cannot concur therein. Fortunately, the legislature has cured one of the mischiefs of the opinion by the enactment of Ch. 293, Acts of the Thirty-fifth General Assembly, making it impossible hereafter for inmates of inebriate asylums to commence actions of habeas corpus against the superintendents of the hospitals before any judge in any county of the state, no matter how remote, and compel him to go with all his witnesses to such remote court to resist the charge that an inmate has been cured of his habits and should be discharged. But for this providential act of the legislature, the superintendents of these hospitals would, under the majority opinion, have little time for anything else than to defend suits brought for these inmates; and would be subject to costs and other expense for which there seems to be no reimbursement from the state.

Again, a refusal to discharge is not an adjudication save as to the condition on the day of trial, and there is no limit as to the number of actions that may be brought by such persons against the superintendents.

Again, without any request from a patient for a parole, this patient may go to any part of the state, bring his action of habeas corpus, demand a trial and put the expenses upon the superintendent or perhaps upon the state, without any request whatever for a parole or conditional release. The effect of this holding upon the administration of our inebriate asylums is that efforts of the state to cure the liquor or drug habit might as well be abandoned. On the first proposition involved, in view of the recent act of the legislature, I would not dissent but for the fact that other actions, as by a parent to recover possession of his child and other actions of like nature, may, under the holding of the majority, be brought in the most remote county of the state, provided a district judge can be induced to grant the writ; and there is no way in which to reach an erroneous order for a hearing and trial in that remote county, although there is no shadow of excuse in fact for bringing it there. In this way, persons in close financial circumstances, having the rightful possession of a child in Fremont county in the southwestern part of the state, may be compelled, say, by the worthless father of a child, to appear before the district court of Allamakee county in the northeast corner of the state, and must pay the expenses of the trip, and doubtless, on request, advance witness fees. The attendance in the supposed case is compulsory, and, according to the opinion of the majority, there is no power to review the question of the right of the district court to issue the writ. I cannot assent to this conclusion.

Section 4420 of the Code provides as follows:

“Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to therefor,

may refuse the same, unless a sufficient reason be stated in the petition for not making the application to the more convenient court or a judge thereof."

Under previous decisions, the applicant has been held to be the person whose liberty has been restrained, no matter who the plaintiff or relator. In the opinion of the majority, this provision as to who may issue the writ has always been the law. Of course, the Supreme Court, or a judge thereof, has jurisdiction co-extensive with the state. But this is not true as to district or superior courts or judges thereof. Their jurisdiction is limited to their respective districts, and, as a rule, to persons within their district. See Code, Sec. 225, *et seq.*, Sec. 260, *et seq.* In certain instances, cases may go on change of venue to other districts, as authorized by Sec. 249, Code, and judges may interchange and they may be assigned out of their regular districts. But the general rule is as above stated, and it requires a special statute to give them any other jurisdiction. Again, personal actions must be brought, as a rule, in the county where the defendants, or some of them, reside. And it is especially provided that actions against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or for neglect of official duty, shall be brought in the county where the cause, or some part thereof, arose. Code Sup., 1907, Sec. 3494. Under the latter statute, it was held that a writ of certiorari against the state board of health must be brought in the county where the board acted. *College of Phys. & Surg. v. Guilbert*, 100 Iowa 213.

The statute giving jurisdiction to the district court in certiorari cases is quite as broad as the one giving such courts jurisdiction of habeas corpus matters, in that it says that the writ may be granted by any district court or judge thereof. Compare Secs. 4155 and 4419 of the Code. Again, as a rule, under the law before its amendment, application must be made to the judge nearest in point of distance to the person

whose liberty is restrained; and if for any reason he cannot or should not act, then to the next nearest in the district where the applicant resides; and if that one cannot or will not act, then possibly to the next nearest outside the district. That is what is held, as I understand it, in *Thompson v. Oglesby*, 42 Iowa 598. It makes no difference that the applicant has a legal residence in some other county; the test is the physical presence of the person whose liberty it is claimed was unlawfully restrained. In *Thompson's Case*, the holding was that the petition should have been presented to the judge of the district court next nearest the person whose liberty was restrained, and it was there said:

“Again, the plaintiff and defendant, the person restrained and the person restraining, must be presumed to be together. The evidence, if any, showing the legality of the imprisonment would ordinarily be at the same place. If the imprisonment is legal, the defendant should be allowed to show it was with the least possible trouble and expense. If the imprisonment is illegal, the person restrained is entitled to his liberty at once. There is no reason why his imprisonment should continue until he can be brought before some remote court or judge, wherever some person may happen to be who desires to present a petition in his behalf.”

Accordingly, the venue was ordered changed to the proper county on defendant's motion.

In the *College of Physicians & Surgeons Case*, which, it is true, was certiorari, and not habeas corpus, but which, for reasons stated, is clearly analogous, the court, quoting the statute, which is the same as the present Code Sup. Sec. 3494, said:

“Under the facts as we have given them, there could be no doubt that such an action must be brought in Polk county, for the alleged illegal acts that constitute the cause of action occurred in that county, and consequently the cause of action

arose there. But it will be seen that the action may be brought in the county where the cause of action or some part thereof arose, and it is thought that some part of this cause of action arose in Lee county. . . . It is urged that the state board of examiners is state-wide, and as much a resident of Lee as of Polk county. Admit this claim, and it does not affect the result. The jurisdiction does not depend on residence, but on the fact of where the cause of action arose. The law provides that the board shall hold meetings in different parts of the state, so as to best accommodate applicants; so that a cause of action is liable to arise in any county of the state, and the jurisdiction is not confined to Polk county, except when the act constituting the cause of action occurred in that county. We conclude that the proper venue of the action is in Polk county.”

Ware v. Sanders, 146 Iowa 233, 240, contains nothing inconsistent with these views. All that the case really decides is that the Supreme Court, or a judge thereof, has jurisdiction in habeas corpus matters coextensive with the state. This remark from that opinion may be quoted as showing the appositeness of the *College of Physicians Case*:

“The right to issue the writ of habeas corpus, like that to issue the writ of certiorari, is a very appropriate, if not necessary, attribute of an appellate court under our system of government, which administers justice according to the principles of the common law. While it is often and truly said that habeas corpus cannot properly be made to serve the office of a writ of error, yet the power given to the Supreme Court to entertain such proceedings is a branch or phase of its appellate jurisdiction, and furnishes a direct and summary method by which, in the interest of liberty, the power and authority of an inferior court to render a given order or judgment by which a citizen is restrained of his liberty may be determined without delay. This view of the nature of habeas corpus proceedings in our court of last resort finds support

in numerous precedents. For instance, in *Clarke's Case*, 100 U. S. 399, 25 L. Ed. 715, the petitioner, being in custody under an alleged illegal process issuing from a trial court, applied to Justice Strong of the Supreme Court of the United States, who allowed the writ, but ordered the hearing to be had before the full bench. Objection being made to the jurisdiction, the court said:

“ ‘It is clear that the writ, whether acted upon by the justice who issued it, or by this court, would in fact require a revision of the action of the circuit court by which the petitioner was committed, and such revision would necessarily be appellate in character. This appellate character of the proceeding attaches to a large portion of cases in habeas corpus, whether issued by a single judge or by a court. The presence of this feature in the case was no objection to the issue of the writ by the associate justice, and is essential to the jurisdiction of this court. The justice who issued it could undoubtedly have disposed of the case himself, though not at the time within his own circuit. A justice of this court can exercise the power of issuing a writ of habeas corpus in any part of the United States where he happens to be. But as the case is one of which this court also has jurisdiction, if the justice who issued the writ found the questions involved to be of great moment and difficulty, and could postpone the case here for the consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course, as he did.’

“*In re Virginia*, 100 U. S. 339, 25 L. Ed. 676, while suggesting in effect that if habeas corpus were to be classed as an original proceeding, there would be doubt of its jurisdiction, the court proceeds to say: ‘But the appellate power of this court is broader than its original, and generally—that is, in most cases—it may be said that the issue of a writ of habeas corpus by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction.’ ”

See also *Rivers v. Mitchell*, 57 Iowa 193.

Authorities from other jurisdictions support the views herein expressed. *Vide In re Jewett*, 77 Pac. (Kans.) 567; *Ex parte Ellis*, 11 Cal. 222, 225; *In re Doll*, 50 N. W. (Minn.) 607; *Barranger v. Baum*, 30 S. E. (Ga.) 524. *In re Jewett, supra*, contains a learned discussion of the matter and cites many cases in support of the rule. *State ex rel. Durner v. Huegin*, 85 N. W. (Wis.) 1046 (62 L. R. A. 700), is also closely in point. See also Church on Habeas Corpus, Secs. 70-74.

The fact that the legislature has passed the act already referred to is not, in my opinion, an answer to these views. No doubt the holding in this case by the trial court was considered so mischievous and so embarrassing to the superintendents of our state hospitals, that the legislature, in the absence of a definite decision by this court on the subject (notwithstanding intimation in one of our cases already cited by me), concluded to set this matter at rest by framing the act in question, without in any manner intending to say that other actions of like kind, which might prove just as mischievous as this one, might be so brought, or intending in any way by entire inaction in those cases to justify the same. *Rural School Dist. v. Dist. of Kelley*, 120 Iowa 119. If anything is to be inferred from legislative inaction, it is that our pronouncement in *Thompson's Case, supra*, and in *College of Physicians v. Guilbert*, 100 Iowa 213, construing the venue of habeas corpus and certiorari proceedings, was correct, for it did not at any time attempt to meet these interpretations of the statute, by amendatory legislation.

There must be some way of reviewing the action of the district court in these matters, and I think it is either to dismiss or quash the writ or to transfer the case to the proper county for trial. It has been the custom of this court in the past, under its plenary power, to issue writs of habeas corpus and direct that they be heard by some district court judge nearest to the parties. This practice was at one time quite

common, and it was rare indeed that this court or a judge thereof, either at Des Moines or at his residence, heard habeas corpus proceedings, for the very good reason that the parties should not be compelled to travel long distances and be at great expense in order to have a hearing.

It must be remembered that, no matter by whom the action is brought, the applicant is the person who is restrained of his liberty, and the defendant is the person who is exercising the restraint. In this case, both were in Henry county, and no application was made to any judge save Judge Springer, in Clayton county, many hundreds of miles by rail from Mt. Pleasant. Whether plaintiff was cured or not was not within the knowledge of persons living in Clayton county, for it was conclusively adjudicated that when they knew her she was addicted to the drug habit, and should be confined in an asylum. There could be no review of that finding upon habeas corpus. The only question, then, according to the majority of the court, was whether she was cured of her bad habits after she had been taken to Mt. Pleasant, and no one but witnesses who saw her after she had been taken to that place could give any opinion as to her recovery—and that was the only issue in the case—so that not only the parties but the witnesses were at Mt. Pleasant, and all were compelled to go to Clayton county to testify at the trial of the case. It is no wonder that the legislature interfered and, when its attention is called to the holding of the majority in this case, it will doubtless again interfere so that like mischiefs may not be perpetrated, when, for instance, some worthless vagabond of a father calls the mother of his child, who has the rightful possession of it, to defend her custody in the most remote part of the state on allegations that he lives in that remote county; that it will be more convenient for him to try it there and that his witnesses live in that county. At any rate, it is to be hoped that something may be done to forbid such a result.

II. Aside from this, I think the majority have destroyed the most valuable feature of the inebriate law by permitting

and suggesting to every dipsomaniac and every victim of the drug habit how to disregard the parole features of the law and encouraging them to bring as many actions of habeas corpus as they can induce attorneys to commence to secure their release, without any conditions or pledges whatsoever. Under allegations of a cure and without submitting the matter to the superintendent at all, any inmate may now secure a writ of habeas corpus and demand as many trials as he or his friends may be able to finance; for, upon such allegation, a proper court or judge must issue the writ. He has no discretion whatever in the matter, and is subject to a penalty if he does not issue it. The district judges in any of the districts where these hospitals are located will doubtless have their hands full in hearing habeas corpus actions.

Plaintiff was committed as a victim of the morphine habit until cured, not exceeding three years. Her commitment was in April of the year 1911, and she made this application in August of the year 1912. She might have made it, if I understand the position of counsel, at any time after commitment, and as many times within the three years and in as many different districts as she could induce judges to grant her a writ. The defendant had not pronounced her cured, nor did he believe it safe to discharge her at the time this proceeding was commenced. The governing law in the case is found in Secs. 2310-a1 to 2310-a32, inclusive, Code Sup., 1907, relating to the detention and treatment of dipsomaniacs, inebriates and those addicted to the excessive use of narcotics. From these we extract the following:

“Sec. 2310-a1. That the board of control is hereby directed to provide for the detention and treatment of dipsomaniacs, inebriates and persons addicted to the excessive use of morphine or other narcotics, in one or more of the hospitals for the insane at the discretion of said board. Said department thus provided for to be designated as a hospital for inebriates.

“Sec. 2310-a2. That all dipsomaniacs, inebriates and persons addicted to the excessive use of morphine or other narcotics, who shall be citizens of the state of Iowa and residents of the county from which they might be committed to the hospital for inebriates may be brought before the district court or judge of the county where they reside for examination and commitment to said hospital for inebriates. Their examination, trial and commitment shall be governed by the same statutes as now apply to and govern the examination and commitment of incorrigibles to the state industrial school. If it shall be determined by said district court or judge, that such person is addicted to dipsomania, inebriety or to the excessive use of narcotics, he or she shall be committed to such hospital for inebriates, as may be established by the board of control as above provided for. The term of detention and treatment shall be, for the first commitment not less than one, nor more than three years; and for the second commitment not less than two nor more than five years. The governor shall parole a patient on conditions named in the following section.

“Sec. 2310-a3. If after thirty days of such treatment and detention a patient shall appear to be cured, and if the physician in charge and the superintendent of said institution shall so recommend, the governor shall parole said patient, provided that said patient shall pledge himself or herself to refrain from the use of all intoxicating liquors as a beverage, or other narcotics, during the remaining part of his or her term of commitment, and shall avoid the frequenting of places and the association of people tending to lead them back to their old habits of inebriety. And shall send the following report on the first day of every month during term of parole to the governor, which report must be inquired into and approved as correct by the clerk of the district court of the county wherein the patient resides, and said patient shall furnish the clerk of the district court with satisfactory evidence of his sobriety and good habits.

“Report of _____ to superintendent of hospital for inebriates at _____ Iowa.

“I, _____ being on parole from the hospital for inebriates at _____ Iowa, do hereby certify that I have up to this date, being the first day of _____, 19—, refrained from the use of all intoxicating liquors as a beverage, and all narcotics of any kind whatsoever, except it be a moderate use of tobacco.

“I have carefully inquired into the record of _____ as named above and do hereby certify that I believe the statements contained in his above report are true.

“Clerk district court of Iowa in and for _____ county, Iowa.

“Dated this _____ day of _____, 19—.

“And if at any time the patient on parole, for any reason fails to make the above report, the sheriff of the county wherein such patient resides shall without further writ or warrant, return said patient at once to the hospital from which he or she has been paroled on receiving notice of such failure from the clerk of the district court of the county wherein the patient resides, or any three reputable citizens thereof. And the patient so returned shall be detained and treated during the full term of his commitment.

“Sec. 2310-a4. That all statutes of the state providing for the trial, commitment, detention and treatment of incorrigibles sent to industrial schools shall be applicable to trial, detention and treatment of all patients committed under the provisions of this act, except in so far as they may be modified by the provisions of this act.

“Sec. 2310-a12. On presentation of the application provided for in section six hereof, unless made in person by an inebriate, dipsomaniac, or user to excess of narcotic drugs, the judge shall issue an order, which may be served by any peace

officer, directing him to bring the accused person before him for examination, and on his appearance, unless he demands a formal trial, the judge shall hear any evidence which may be adduced touching the accusation. The accused may be represented by counsel and the judge may, if he deems it necessary, require the county attorney of the county where the hearing is had to attend and assist in such hearing. In case said application be voluntarily or involuntarily made and the said judge shall determine that the accused is a proper person to be committed to said hospital, he shall make an order committing him thereto; otherwise he shall be discharged. The term of detention and treatment shall be until the patient is cured and not exceeding three years. Provided that before a person shall be committed to a state hospital for inebriates satisfactory evidence shall be submitted to the trial court or judge showing that the person committed is not of bad repute or of bad character apart from his or her habit for which the commitment is made and that there is reasonable ground for believing that the person if committed will be cured of such habit, and provided further, that the board of control of state institutions may discharge any person committed to a state hospital under the provisions of this act on the recommendation of the superintendent when satisfied that such person will not receive substantial benefit from further hospital treatment.

“Sec. 2310-a19. Any patient whom the superintendent believes to be cured may be paroled, conditioned on said patient's signing a written pledge agreeing to refrain from the use of all intoxicating liquors as a beverage, and from the use of morphine and cocaine or other narcotic drugs during the term of his commitment, and shall avoid frequenting places and the association of people tending to lead him back to his old habits of inebriety. And said paroled patient must make written reports to the superintendent of said hospital at the beginning of each month on blanks to be furnished the clerk of the district court for that purpose, to the effect that he has not during the month past in any respect violated any

of the terms and conditions of his parole, which reports must be investigated and approved by the clerk of the district court of the county in which the patient resides, who may demand from said paroled patient satisfactory evidence as to the truth of the statement. If, at any time, a patient on parole shall fail to make said report, or shall fail in any respect to fulfill all of the conditions upon which said parole was granted, he may without any further proceeding whatever and on the written order of the superintendent of said hospital be taken and returned to the hospital, there to be detained and treated as provided herein. Said patient so violating his parole may be returned by any peace officer, or by any officer or person whom the superintendent of the hospital may direct so to do.

“Sec. 2310-a22. Females who are dipsomaniacs, inebriates or addicted to the excessive use of morphine, cocaine, or other narcotic drugs, may be committed to a state hospital for the insane to be designated by the board of control, for treatment, and all the provisions of this act, so far as applicable and except as modified by this section, shall apply in such cases and also to the cases of such females as may remain in the hospital for inebriates connected with any state hospital.”

There is some confusion and apparent conflict in these provisions, but it is apparent from the original acts that Secs. 2310-a6 to 2310-a31, inclusive, save Sec. 2310-a22, have reference to male inebriates; while Secs. 2310-a1 to 2310-a5, inclusive, have reference to all inebriates, whether male or female, and the latter are either repealed or amended by the special statutes above referred to, applying to male inebriates only. It is a little difficult to harmonize Secs. 2310-a2, 2310-a3 and 2310-a4, and 2310-a12 and 2310-a22, relating to the manner of trial and term of commitment. As to females, the term is until the patient is cured, and not exceeding three years, and the parole provision as to males appears in Sec. 2310-a19.

As I understand it, the provisions of Secs. 2310-a1 to 2310-a4 have reference to proceedings against females, the term

of commitment and conditions for parole. On no other theory may they be harmonized. The males are kept together at the institution at Knoxville, and the females are sent to one or all of the state hospitals for the insane. Females are proceeded against as if they were incorrigibles, or perhaps as males, by reason of Ch. 185, Acts Thirty-fifth General Assembly, and the term of commitment is not less than one, nor more than three years. Provision is made as to the parole of both males and females, and Sec. 2310-a3 relates to females, while Sec. 2310-a19 relates to males; unless perhaps, in view of Secs. 2310-a19, 2310-a22 and 2310-a27, the terms and conditions for parole should now be held to be the same whether the patient be male or female.

While there may be some doubt about this being the true construction of the written laws upon the subject, it being our duty to harmonize them if possible, this opinion is not wholly based upon this construction. If I am right, the case is easy of solution. The trial court on the original hearing should have committed the plaintiff for a definite time, to wit, not less than one or more than three years, and the effect of its sentence was to commit the plaintiff for three years. But the statute we have already quoted makes provisions for a parole after thirty days upon recommendation of the physician and superintendent in charge. This is to be given if, to the officers charged with such duty, the patient should appear to be cured, and then only upon certain pledges being made by the patient, etc. Provision is also made for the return of the patient in case of a violation of the pledge or of any of the statutory conditions.

If this be the law, then it is perfectly manifest that plaintiff in this case was not entitled to her discharge, and that the trial judge had no authority to release the plaintiff or to relieve her from her pledge or the statutory conditions. If he had this power, then he had power to abrogate statutory provisions without any authority. These provisions were wise ones, made for the benefit, not only of the patient, but also

of the general public. This "ticket of leave" could only be granted upon recommendation of the physician and superintendent, and the conditions imposed were due to the known fact that the drug habit is difficult to cure, and the victim uncertain, even though apparently cured.

No court should assume to exercise this power for the physician and the superintendent, and even if it could, it should demand the pledge required of the patient as a condition to her release. Any other rule would entirely destroy the efficacy of the parole system. There is no claim that the superintendent acted fraudulently or corruptly, or that he refused to grant a parole under proper conditions, and we do not have these facts to consider, even if they might, under any circumstances, be taken into account.

But assuming that Secs. 2310-a2, 2310-a3 and 2310-a4 have been repealed *in toto*, both as to males and females, and that the matter is governed by Secs. 2310-a11, 2310-a12, 2310-a13 and 2310-a19, the commitment is until the patient is cured and not exceeding three years; and there is a provision for a parole at any time when the superintendent believes the patient to be cured, upon certain conditions and pledges. Of course, the superintendent's belief as to cure is the equivalent, in his mind, to "cured"; and the law guards both the patient and the public by providing that, if the patient is released as cured before the expiration of the three years, it must be on certain pledges and conditions. The term is three years; but if the patient is believed by the superintendent to be cured, he or she may be released short of that time upon certain conditions. Whether or not the patient is cured at any given time is a mere question of belief at most. Proof of absolute cure cannot be made. It is not within the power of the human mind to know whether or not one is cured of a given habit until it has been proved by conduct; hence any distinction between an actual cure and belief as to a cure is too refined for discussion. Indeed, there is and can be no difference upon this proposition. The point to it is that the

belief as to a cure must be that of a particular individual, to wit, the superintendent of the hospital. None other may substitute himself and grant the parole.

The most that can be said for the conclusions of the trial court in this case is that he believed the plaintiff to be cured; but he released her without requiring any pledges or exacting any reports; and no matter how soon she may resume her old habits, there is no way of getting her back to put in her full time of three years, except by another independent hearing upon the matter. Surely, even if the case should be determined under the provisions of the law relating to the hospital at Knoxville, there was no justification for releasing plaintiff on the belief of the trial judge that she was cured. Any other construction would involve the superintendents in constant litigation; for a patient not desiring to take the pledge or to comply with the provisions of the law could at any time hale the superintendent into court and have the trial judge determine the question as to an apparent cure, and if he believed there was a cure, he would be bound to release the patient, without exacting any pledge, and unconditionally.

If counsel are right in their view, then the provisions as to parole are absolutely nugatory. The physician and superintendent in charge have the best means for knowing whether or not the patient appears to be cured, and it must be assumed that they will act upon this knowledge, and if they believe there has been such cure, they may release short of the full time, and when this is done, a pledge is exacted from the patient, and certain other requirements made. On the other hand, if their judgment is not controlling (in the absence of fraud or want of good faith), then the parole system provided for in this law is worthless; and instead of taking the judgment of experts, the trial court exercises its belief and gives an absolute discharge without any conditions, and this it may do without any limitation whatever as to time. I do not think this is a correct exposition of the law.

It is the judgment of the special tribunal which justifies the discharge, and neither courts nor judges are given power by statute to review that judgment or belief. Counsel quote a provision of law relating to the discharge of insane persons, which does not either expressly or by implication relate to inebriates, dipsomaniacs, or those given to the use of drugs. It relates expressly to insane persons. As to these, there is a complete system of its own. No constitutional right of plaintiff is infringed by the construction we place upon the law. It is somewhat akin to the indeterminate sentence law, which has been sustained by this court, and no court has ever suggested that the parole system, or "ticket of leave plan," violates any constitutional limitation. The indeterminate system is based upon the thought that the prisoner has reformed and that it is safe to turn him loose upon society again; but no one can determine that fact except the board created for that purpose. The commitment of inebriates, male or female, is in effect indeterminate, save that it cannot exceed a certain number of years, and at the expiration of that time, the patient must be released whether cured or not; before that time, it is left to the physician and superintendent (or superintendent alone) to say when they think a cure has been effected, and to release upon certain pledges and conditions. If it should appear that they were wrong in their judgment, or the patient puts herself in the way of temptation or resumes her old habits, or violates any of the conditions under which she has been released, she may be returned to the hospital and made to stay until it appears safe to discharge her, and in any event the maximum term is fixed.

Counsel make too much of the supposed distinction between absolute cure and apparent cure; there is and can be no difference, so far as this proceeding is concerned. If one committed as an inebriate or dipsomaniac may at any time have the question of her cure, or apparent cure, submitted to a district court or judge upon testimony from experts and non-experts, and said court may, if it believes the patient

cured, absolutely discharge her, what becomes of the parole feature of the law? As already intimated, the trial court or judge cannot pronounce absolute cure; at best, the cure is only apparent, and a release made by a court must be final and without power of revocation or recall. The superintendent cannot release on parole short of the three years unless there is an apparent cure. If there is an apparent cure, must the superintendent give a full release, or may he give a full release in one case and a conditional one only in another? If the latter be the case, then how is he to distinguish between a cure and an apparent cure? If the superintendent has difficulty here, it would seem, according to the argument for appellee, that the district court or judge could have none; and if the court should find that the cure was only apparent, he should remand the applicant to the custody of the superintendent again. Would such a finding be in any way binding on the superintendent, and would he be obliged, because of the finding of the trial court or judge, to grant the applicant a parole?

If the court had jurisdiction to make the finding, its judgment is conclusive on the superintendent and a release on parole would be inevitable, no matter what the superintendent might think of the case. What would become of the statute with reference to parole, if this proposition should be affirmed? Again, suppose the court or judge should find, contrary to the conclusion of the superintendent, that the patient was either actually or apparently cured; and it should turn out within a few days that the apparent cure was a mistake. What could be done to rectify the mistake? Appellee's counsel say, "nothing"; that this is one of the incidents of all trials. It is apparent that the law in question was enacted to prevent just such mistakes. If not, then the entire scheme is a failure. Unless there is a further fixed time to serve, there can be no parole, and if there can be no parole when a patient is cured or apparently cured, but only an absolute release, then there is no parole but an absolute

release; so that the legislature made a mistake when it said that dipsomaniacs might be released on parole on certain conditions and upon pledges being exacted.

There is nothing unusual in the "ticket of leave" and parole plans. They are regarded as essential to a humane administration of the law which authorizes the detention of a person accused of crime, or given over to some disease which makes him a fit subject for confinement. Reformation is much the most important element in all our prison and detention schemes, and it is to be regretted if all systems leading to that end must be abandoned, and the matter of release given over to courts and judges alone. Such has never been the thought heretofore, and no good end can be accomplished by wiping out the parole features of this dipsomaniac law. No claim is made in the petition filed for plaintiff in this case that her sentence was not in accord with the law; hence any discussion on that subject is wide of the mark. There is no statute which, in express terms or by necessary implication, gives a dipsomaniac or inebriate the right to disregard the parole law and go directly to the district court or a judge thereof for a release, because he or she believes he is cured; and this is especially true where the patient never asks the superintendent to act or to discharge her on parole or otherwise. And if, as already suggested, such a patient does not have to go to the superintendent for a discharge, either on parole or otherwise, then the parole features of this law are absolutely repealed by judicial interpretation. And in the future, the superintendent, instead of using his judgment as to a cure, must go into court, no matter whether he has been asked for a release or not, and justify his detention of the prisoner. And although he may protest that he does not believe him cured and has better means for knowing that fact than any other person, he must, if the trial judge thinks there has been a cure, absolutely discharge the prisoner.

The difficulties growing out of such a situation may well be apprehended and discipline in the institutions will be im-

possible. Patients committed for these habits are sound in mind and generally have friends always ready to help, and these friends (?) will doubtless make it very unpleasant for the officials of these institutions in the future, if appellee's contention be adopted. The fact that a writ of habeas corpus may be used to release one from custody does not assist the plaintiff at all. Habeas corpus is a remedy to establish rights. If the applicant is not entitled to his absolute release, he is not entitled to this remedy. The question here is not whether habeas corpus will lie, but whether, under the statutes construed as a whole, defendant is wrongfully restraining applicant of her liberty—whether she is entitled to an unconditional release.

The statute is not silent as to who shall determine whether there has been a cure short of the three years, unless we do as appellee suggests: wipe out the parole features of the law. If it does not give the superintendent power to do so, then of course the only remedy is by action in court by habeas corpus. For, without authority in the superintendent to discharge short of three years, there is no power anywhere, save in the courts, and any patient seeking to be discharged within the three years must bring an action in the district court or before a judge to secure a discharge, even if it be conceded on all hands that there is a cure or an apparent cure within a year or so. No one has supposed heretofore that this was the case, and a great burden has been added to those already imposed upon the courts if they must now administer hospitals and inebriate asylums; for, according to the argument for the appellee, no one but a court or judge may discharge an inebriate or dipsomaniac, no matter how firm the belief as to cure. The superintendent of the hospital cannot do so, and neither may the board of control. If the legislature makes any distinction between cure and apparent cure, as applied to the administration of the law now before us, it is not apparent. There is no statute providing for an absolute dis-

charge short of the full term without a parole, as appellee's counsel intimate.

I think the trial court erred in discharging the plaintiff.

I am authorized to say that PRESTON, J., concurs in this dissent in both divisions, and LADD, J., in the second division thereof, but not in the first, concurring with the majority upon this latter proposition.

H. B. CARMICHAEL, ADM., Appellant, v. BETTENDORF
AXLE COMPANY, Appellee.

NEW TRIAL: Excessive Verdict—Option to Remit or New Trial—
Power of Court. The court has undoubted power, whenever satisfied that the verdict of a jury is excessive, even though not on account of passion or prejudice, to order a new trial in event the prevailing party refuses to remit a designated portion of the verdict.

Appeal from Scott District Court.—HON. A. J. HOUSE, Judge.

TUESDAY, SEPTEMBER 21, 1915.

APPEAL from the order of the court granting defendant a new trial.—*Affirmed.*

Ely & Bush, for appellant.

Cook & Balluff, for appellee.

GAYNOR, J.—This action is brought by the plaintiff as administrator of the estate of one Herbert I. Henry to recover damages for injuries resulting in death. There was a trial to a jury and a verdict for the plaintiff for \$11,000. Defendant filed a motion for a new trial based on several distinct grounds, among which it alleged that the verdict was excessive.

1. NEW TRIAL:
excessive ver-
dict: option to
remit or new
trial: power
of court.

Upon the submission of the motion, the court made the following finding, and ordered:

“After an examination of the authorities . . . we are of the opinion that the amount of the verdict herein is excessive, but not to the extent of showing passion or prejudice on the part of the jury. It is therefore ordered by the court that if the plaintiff shall elect to file in this court a remittitur of all of such verdict in excess of \$5,000.00 within thirty days from the filing of this order . . . the motion for a new trial shall stand overruled, and thereupon judgment shall be entered in favor of the plaintiff for the amount of \$5,000.00. But in case such remittitur is not so filed by the plaintiff, then an order shall be entered sustaining such motion, and granting a new trial herein.”

The plaintiff did not file a remittitur, as required by the order of the court, within thirty days. Therefore, under the order of the court, the motion for a new trial stood sustained. The plaintiff appeals to this court and complains:

1. The court erred in requiring plaintiff to file remittitur of all the verdict in excess of \$5,000 as a condition precedent to overruling the motion for a new trial.

2. The court erred in making an order granting a new trial in case such remittitur was not filed by the plaintiff within thirty days.

3. The court erred in holding that decedent's estate was not damaged to exceed \$5,000, and in limiting recovery to that amount, after expressly finding that the verdict of the jury was not sufficiently excessive to indicate passion or prejudice.

The argument of the appellant is that in no case has the court a right to set aside a verdict because, in the judgment of the court, the amount allowed is excessive; that the amount is a fact, and is determined only by the jury; that the jury are the triers of the fact, and that its finding upon an issuable fact, where the finding of the fact is supported in the evidence, is conclusive upon the court. It is suggested that in no case has the court a right for itself to weigh the evidence,

sit in judgment upon the credibility of the witnesses, and find an issuable fact to be other or different from that found in the pronouncement of the jury.

The fullness of this contention cannot be accepted as the law of this state, in view of our statute. It is true the court has no right, arbitrarily, or through caprice, to set aside the verdict of the jury. Nor has the court a right to determine a fact in issue adversely to the finding of the jury, where there is evidence to support the finding of the jury, and arbitrarily determine the fact for itself, and pronounce its judgment accordingly. To hold that this power lies in the court would be to emasculate the verdict of juries, and leave it in the power of the court to pronounce such judgment, notwithstanding the verdict, as it saw fit.

The court, in this case, did not pronounce judgment on the verdict, nor did it fix any amount arbitrarily and pronounce judgment for that amount. The court clearly was of the opinion that the judgment was excessive, though not the result of passion or prejudice. It tendered to the plaintiff the option to accept or reject an amount which, in the judgment of the court, appeared reasonable and just under the evidence. To hold that the court may not do this would be to revolutionize the practice in this state and in this court. Courts have supervisory power over the verdicts of the jury, and where the verdict returned appears to the trial court as excessive, the court may fix an amount which, in its judgment, would be fair and right between the parties, and allow the plaintiff to accept that amount and judgment therefor or reject it, as he sees fit, and if he fails to accept, a new trial may be ordered, as was done in this case.

The practice which has prevailed, not only in this state but in others, of giving to the plaintiff an option to remit the excess in cases where, in the judgment of the trial court, the verdict returned is excessive, tends to promote justice and lessens the expense to litigants and the public. The court, in these cases, does not arbitrarily fix an amount which the

plaintiff must accept, but gives to the plaintiff an option of accepting that amount; and, if he elects to do so, the controversy is ended. If he fails to do so, his right to have the amount ascertained and fixed by another jury is still open to him.

As supporting the action of the court below and as indicating a similar practice in other jurisdictions, see *Collins v. Railroad Co.*, 12 Barb. (N. Y.) 492; *Clapp v. Railroad Co.*, 19 Barb. (N. Y.) 461; *McIntyre v. Railroad Co.*, 47 Barb. (N. Y.) 515; *Woodruff v. Richardson*, 20 Conn. 238; *Whitehead v. Kennedy*, 69 N. Y. 462; *Doyle v. Dixon*, 97 Mass. 208; *Jewell v. Gage*, 42 Me. 247; *Belknap v. Railroad Co.*, 49 N. H. 358; *Pendleton R. Co. v. Rahmann*, 22 Ohio St. 446; *Illinois C. R. Co. v. Ebert*, 74 Ill. 399; *Kinsey v. Wallace*, 36 Cal. 462; *Blunt v. Little*, 3 Mason (U. S.) 102.

The last named case was an action for damages for malicious arrest. There was a motion for a new trial on the ground that the amount allowed was excessive. This case was decided in 1822. Justice Story, presiding, said in substance:

“As to the question of excessive damages, I agree that the court may grant a new trial for excessive damages . . . It is indeed an exercise of discretion full of delicacy and difficulty.”

And he concluded by saying in substance that, where it clearly appeared to the trial court that the jury had committed an error in giving excessive damages, it was the duty of the court to interfere. He proceeded to say, in conclusion:

“In the present case, there were many aggravated circumstances, and certainly, the defendant had no cause of action. It appeared to me at the trial, a strong case for damages; at the same time, I should have been better satisfied if the damages had been more moderate. I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law. After

full reflection, I am of the opinion that it is reasonable that the cause should be submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages. If he does, the court ought not to interfere farther."

We submit the following cases from our own court, recognizing the practice of which complaint is made in this case: *Collins v. City of Council Bluffs*, 35 Iowa 432; *Lombard v. Chicago, R. I. & P. Ry.*, 47 Iowa 494, 498; *Doran v. Cedar Rapids & M. Ry.*, 117 Iowa 442; *Schmidt v. Mehan*, 167 Iowa 236.

We find no reversible error in the case, and the cause is—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

IN RE ESTATE OF WILLIAM ELLENBERGER, SR., Deceased.

EXECUTORS AND ADMINISTRATORS: Special Administrator—

1, 3 Propriety of Appointment—Discretion of Court. The mere fact that there is some evidence that the application for the appointment of a special administrator is not made in good faith but for the attainment of purposes not authorized by law (Sec. 3299, Code, 1897) is not necessarily sufficient to overthrow an appointment. The legal discretion of the lower court to refuse or to grant the appointment will not be interfered with in the absence of a showing of abuse of such discretion.

EXECUTORS AND ADMINISTRATORS: Special Administrator—

2 Appointment—Probate of Will Suspended by Contest—Effect. The filing of a contest of a will prior to the probate thereof has the effect of suspending the immediate probate of said will and authorizes the appointment of a special administrator under Sec. 3299, Code, 1897.

EXECUTORS AND ADMINISTRATORS: Special Administrator—

1, 3 Propriety of Appointment—Discretion of Court.

EXECUTORS AND ADMINISTRATORS: Special Administrator—

4 Appointment—On What Evidence Determined—Merits of Will Contest. On the question whether a special administrator should be appointed pending the determination of a will contest, the court should not assume to try out the merits of the will contest.

EXECUTORS AND ADMINISTRATORS: Special Administrator—

- 5 **Basis for Appointment—Prevention of Loss—Incompetency of Those Possessing Estate.** The right to appoint a special administrator rests on a fair showing of necessity to protect the estate from loss by the appointment of a disinterested and competent administrator. Such showing may involve some inquiry into the lack of capacity and the presence of undue influence on the part of those claiming the estate and in charge thereof. Appointment sustained in case at bar.

PRINCIPLE APPLIED: A father had executed deeds and a will of all his lands to his two sons. After his death, the daughters filed a contest of the will and, on their motion, a special administrator was appointed. The evidence showed that for many years the sons had exercised an unlimited dominion, largely savoring of imposition and undue influence, over the property interests of the father, who was blind, helpless and uneducated. The testimony of the son touching the condition of the father's affairs and his knowledge and handling thereof was contradictory, equivocal, evasive, and strongly suggested concealment of the true condition. *Held*, sufficient to support the action of the lower court in making the appointment.

EXECUTORS AND ADMINISTRATORS: Special Administrator—

- 6 **Appointment—Briefness of Tenure—Effect.** The fact that the tenure of office of a special administrator will be very brief may have bearing on the necessity to review the appointment but presents no reason for reversing the appointment.

EXECUTORS AND ADMINISTRATORS: Appointment of Special

- 7 **Administrator—Restraining Order Pending Appeal.** It is suggested that, in view of the statute (Sec. 3299, Code, 1897), an order restraining a special administrator from the performance of duty, pending an appeal from the order of appointment, ought not to be entered.

INJUNCTION: Interlocutory Restraining Orders Pending Appeal—

- 8 **Effect on Final Decision—Res Judicata.** Interlocutory restraining orders issued by one of the judges of the Supreme Court have no bearing on and in no manner control the final decision on appeal.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

TUESDAY, SEPTEMBER 21, 1915.

ON the 25th day of September, 1909, William Ellenberger, Sr., made what is alleged to be his last will. He died some time in April, 1914. The probating of this will was

set to be heard on April 30, 1914. Before probate was granted, the three daughters of testator, now appellees, filed notice of contest, and thereupon probating was suspended, and the contest has not yet been tried. In this situation, one Korab, who is not a party in interest, was, on the application of the daughters, and over the objections of the appellants, appointed special administrator. From this the two sons, chief beneficiaries in the will, appeal.—*Affirmed.*

Wade, Dutcher & Davis, for appellees.

Ney & Bradley, for appellants.

SALINGER, J.—I. One attorney for appellees verified the application for a special administrator, and was thereupon subjected to cross-examination. Appellants assert that this

cross-examination reveals that said attorney, and his clients, are making application in bad faith, and, for objects not contemplated by the statute, permitting the appointment of special administrator, with intent to harass appellants, who are the chief owners of the estate, and with purpose to exploit that estate by gathering evidence for use in contesting the will and other instruments disposing of the estate, at great expense to such estate. They insist that the administrator who was appointed at the instance of appellees is one “whose duty it is to be active and obey the suggestions of the heirs and his attorney.” The ultimate argument is that the issue we have to determine is whether a special administrator should be appointed for the purpose of exploiting the estate and finding evidence pending and for use upon said contest. This contention does not require us to pass upon whether a fair construction has been put upon the testimony given by said attorney upon said cross-examination.

1. EXECUTORS
AND ADMINIS-
TRATORS:
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estate, and with purpose to exploit that estate by gathering evidence for use in contesting the will and other instruments disposing of the estate, at great expense to such estate. They insist that the administrator who was appointed at the instance of appellees is one “whose duty it is to be active and obey the suggestions of the heirs and his attorney.” The ultimate argument is that the issue we have to determine is whether a special administrator should be appointed for the purpose of exploiting the estate and finding evidence pending and for use upon said contest. This contention does not require us to pass upon whether a fair construction has been put upon the testimony given by said attorney upon said cross-examination.

We think it sufficient reply that the court appointed an administrator who is by the record shown to be a man of good standing and disinterested; that the presumption must be indulged he will act faithfully within the limits set by the

law; that he will be at all times under full control of the court; and that, if expense be a material consideration, that of resisting the appointment, and of this appeal, is greater than the expense of special administration should be, or under supervision of the court is likely to be. It may be added, in passing, (1) that the cross-examination should be used for all that it establishes, and if it tends to show that the application is, in part, prompted by desire to get more than is due from a special administration, it also shows such feeling on part of contestants and their counsel as that it would have been, at least, unwise to appoint any of the appellants; and (2) it is remarkable that parties who concede it to be the function of such administrator to be the tool of some who are interested in the estate should also urge that, if an appointment were proper, it should have been given to the son William, rather than to a disinterested person.

II. *Meikle v. Hobson*, 167 Iowa 666, decided in this court December 15, 1914, is called to our attention. We there decide that, since a party may be a witness in court, if such party fails to appear to an action in his own right, the other may, at his election, have a continuance at the cost of the delinquent, and an action may be dismissed if plaintiff fails to appear when the case is called for trial; that, in a suit brought by husband and wife against a third person, neither is in contempt for refusing to testify on a deposition sued out by the defendant. This is put on the ground, among others, that to permit it "would lend the full power of the court to a process for the discovery not only of the claims of the opposite party, but also the details of the evidence, so far as known to the plaintiff, upon which the case would depend, not regulated by the control which a court will give as to excluding testimony which is not competent or is forbidden." The only argument with which we are favored as to the applicability of this is the statement that "the very purpose in Judge Wade's mind in the cited case, as shown by this opinion of the court, is the same illegal scheme as in the case at bar, as he admits in his evidence as a witness in this case

at bar when he testifies in support of the petition for appointment of Korab as special administrator."

The essence of our holding in *Meikle's Case* is that, since parties to a suit may be adequately dealt with in open court for failure or refusal to give proper testimony, the general deposition statute should not be resorted to in order to obtain their testimony, because the only possible use of such proceeding would be to obtain testimony, which the court itself would not admit. In its general aspect, it declares the self-evident postulate that the machinery of the law shall not be resorted to colorably, oppressively, nor to obtain what the law does not grant. The mere claim that the application at bar was made for some such purpose is not enough to invoke the application of this rule here, even though there be evidence to sustain the accusation. The statute provides (Code, Sec. 3299) that under given conditions a special administrator "may" be appointed. Whether the appointment was sought for improper purposes was one of the things to be presented to and considered by the court applied to. The language of the statute gives that court power to grant or deny. Had the court found that the application was for purposes such as appellants assert, it would have been its duty to use its discretion to deny the application. It follows that the granting of it involves finding as a fact that the application was a rightful one. If there be evidence upon which we would have sustained the court had the finding been to the contrary, the finding it did make is yet so sufficiently sustained by the evidence as that we may not interfere.

III. The Code, Sec. 3299, provides that:

<p>2. EXECUTORS AND ADMINIS- TRATORS: special admin- istrator: ap- pointment: probate of will suspended by contest: effect.</p>	<p>"When, from any cause, general admin- istration or probate of a will cannot be immediately granted, one or more special administrators may be appointed to collect and preserve the property of the deceased, and no appeal from such appointment shall prevent their proceeding in the discharge of their duties."</p>
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Under the express language of this statute, a special administrator may be appointed whenever the "probate of a will cannot be immediately granted." The appellees filed a contest upon the will which appellants offered for probate. The contest has not yet been tried. Notwithstanding the claim that as wills may be contested after probate, the statute (Sec. 3283, Code), that "after the will is produced the clerk shall open and read same, and a day shall be fixed by the court or clerk for proving it, which shall be during a term of court, and may be postponed from time to time in discretion of the court," does not provide, expressly at least, that probate shall be held up until after a contest is decided, we are constrained to hold that the bringing and pendency of this contest did produce a situation which prevented immediate probate. This is not only so of necessity, but the language of the Code prohibits the interpretation of appellants. A requirement that a day be fixed, with discretionary postponement from time to time, makes impossible an "immediate" grant of probate, and that probate once granted may be set aside has no bearing on whether probate may be granted before a pending contest is decided.

Additionally, it is urged: (1) that even if conditions existed which authorized appointment, the same was needless because of the character and financial responsibility of resistors, which of itself is a sufficient guard for whatsoever rights contestants have and sufficient warrant for permitting their opponents to have full control of the estate pending contest, to say nothing of the fact that appellants were both willing and able to furnish any bond required to safeguard the ultimate rights of appellees; (2) that though the instituting of a contest prevents the immediate grant of probate and therefore gives the court power to appoint a special administrator, it should, on application therefor, consider whether the contest is frivolous, and try out the very questions that must be determined on

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the hearing of the contest and may there be determined by a jury; and (3) that the evidence shows that the contest was purely captious and frivolous, instituted to harass by those who, under the will, have but a small interest in the estate.

The court, in passing upon an application for special administration, is called upon to decide whether it is right-ful to grant it. The granting finds, *inter alia*, that the appli-

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cation is neither needless, frivolous, captious nor vexatious. Such decision by the court may rest upon testimony that is relevant in a will contest. But this does not warrant a trial of the contest and a refusal to grant special administration, unless the court is

satisfied that the contest should be sustained. The discretion given is not abused, because exercised when it is not absolutely clear that the obstacle to immediate probate is not purely colorable. This must be so for two reasons, at least. The contestant is entitled to a reasonable time to prepare for trial, and should not be denied purely interlocutory relief which may be necessary to preserve the subject of the contest, merely because he has not all the evidence which he may have on the contest trial ready on the hearing of the application for such interlocutory aid. And this application cannot be tried to a jury, while the contest can be. Wherefore, it cannot be that the one hearing is to assume the functions of the other.

Keeping in mind, then, that it is no more our province than it was that of the trial court to determine whether the record exhibits sufficient to set aside the will, we have

5. EXECUTORS
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no hesitation in saying that there was enough to sustain the finding of facts inherent in the order made below, against purely appellate review; that there is enough evidence of danger of loss in the absence of a disinterested and competent administrator, and of lack of capacity and presence of undue in-

fluence, for the purposes of this review, as the following shows:

Appellant William says he is 41; that his brother Nathan is 33, and his sister Mary about 22; that he, himself, has not gone away in forty years, and never got any wages, but that he bought land in Texas and made the money to pay for it. He adds that he did so by getting the money from home. He stopped working some ten years ago, when the mother died. At that time, the father agreed that if William would stay, he could have all he made. The two brothers did stay, and so did Mary. He admits that Mary has been living with the father and the brothers ever since William was of age, and was the only woman around there. After doing this, he proceeds to minimize it; says she lived there but part of the time, and he does not know how much time she has been away; he does not know whom she has been working for all these years; part of the time nobody kept house there. She was not working for him, but he gave her money, of course, when she was there. He does not know just what she did with it, guesses what he gave her was small amounts for her clothes, but he does not know whether she got clothes with it or not. The brothers rented the farm, some three hundred acres, and did have all they made. But William explains that they had heavy expenses for the father. Those expenses are not detailed, and the record as a whole indicates that the father was not of expensive habits, and rarely went where he could spend money. It is apt to be true that the care of a blind father is expensive; but William, evidently having in mind that too helpless a father might be challenged as a testator or grantor, explains this expense possibility out of existence by saying: "My father was blind before he died, but I cannot say how long. Of course, I don't know if he was blind or not. Of course, he could get around, I don't know whether he was blind or not." William has been running the place for the last twenty years, and the brothers have been caring for and nursing the father for many years. Some ascendancy seems thus to have been gained. The father could not so much as write his name. William has done the buying and selling;

he drew on the deposits of the father by signing the name of William. As seen, appellants kept all they made off 300 acres of land, while the land still remained in the name of the father, and afterwards it was conveyed to the sons. Despite the ownership of the land, William says the father has not made a dollar in many years; that everything on the land has for the last ten years belonged to the boys, except the household furniture. As to the furniture, William says he does not know anything about whether the father owns that; that the brothers do not claim to own it, and William is willing that his sisters may have it. In fact, he says anybody may have it. For the father who owned all this land, William did buy groceries and furnish a bed, and says he would have done more than that if the father had said so. For this owner of some \$60,000 worth of land, the sons paid his debts, not detailed. His very funeral expenses and bills of his last illness were unprovided for, except as William chose to pay them; but though William went for a man to draw the will and the deeds to all the land and paid the man to draw them, this father, who did not do the simplest business for himself, made this will without the knowledge of his sons, and they did not learn so much as that a will existed, during the five years in which they had charge of the father after the will was made. This father, on his own motion, and as quickly as he could convey the thought and directions to the scrivener, first has deeds made to all he has, and then a will bequeathing an estate he no longer owns, which provides for legacies, leaving nothing wherewith to pay them. He does not mention the will which gives these legacies, but trusts that matter to "independent agreement." This he does, although he delivers the deeds; and at this time, just after the will had been made, and several times before, he gets an agreement to honor his gifts to his three daughters, which were put into the will. When the one son gets the scrivener, he does not get two sisters who live at a not much greater distance away than does the scrivener. When the will is drawn, the boys,

the sister Mary, and the hired man Bane are the only ones at home. Bane participated to some extent, and is not produced.

On one showing by the sons, they had no means on the day the deeds were drawn, other than that William owned some undescribed and unvalued Texas land. But their witness, the scrivener White, claims that the father spoke of several pieces of land then deeded as lands for which the boys had paid him; that it should, therefore, be in their name, and fixed while he was living, so there would be no trouble afterwards. This witness adds that, as to the balance of the land, he guesses it was a cash sale for the amount stated in the deeds as consideration. He says nothing was said as to where the boys were to get the money to pay spot cash, nor as to giving notes, and the witness adds that they had that arrangement among themselves. William, however, clears all this up by saying that nothing was paid for the land, and that he spent all the money he ever got from his father. White says the testator spoke right up and said something about he wanted to make it right,—“fix it up right and equal.” Thereupon, to carry out this desire to make things equal, he gave Mary, the daughter who stayed at home, three cows for extra services, and each of his three daughters \$1,000, and all the lands to the three boys. He also desired that William be made executor. The will was finished hurriedly, “because it was getting late.” William got the deeds and did not record them during the five years that the father lived.

We do not overlook the fact that the scrivener says that, in his opinion, testator was sane; that no coercion was used in his presence, and that all the father's acts were spontaneous; neither do we overlook the fact that this witness makes it plain that he has had little opportunity for judging of the capacity of the father, and that it is not likely acts of coercion were employed in his presence. William offers bonds freely, because he knows all about the property; yet, though he has been running the place for twenty years, he says he

knows nothing about the crops, and that his father never said anything about them. Ever since 1908, he signed his own name in drawing on the deposits of his father, which he says amounted to "a little money." He names the banks of deposit, and "thinks" there was \$500 in them when the father died. He says he has the certificates; that they are in the name of his father; but he does not know whether they belong to his father's estate, and he says that nothing belongs to that estate "that he knows of except these deposits."

In connection with offering bond in any sum which the court may in reason order, to assure appellees of their rights as same may ultimately be determined, appellants say they make such offer the more readily because they know the nature, extent and location of all the property the father had at his death. As seen, and as will appear later, they also claim that the father left no property at his death, and that he owned no personal property for ten years before his death. Though, despite their claim there is no property, they are, upon confession, able to point out definitely what personal estate there is, it must be admitted they have not done so in this record, and that some peculiarities are developed as to the personal property, if any there be, and other peculiarities, if there be no estate.

The will was drawn after deeds to all the lands owned by the father had been made. According to appellants, there was no property other than certain lands, except some deposits, relatively unimportant in size, upon which drafts drawn in the name of one son were being honored while the father still lived. There is no explanation why, in such circumstances, a will was drawn at all, and why the testator should say that he was disposing of "real and personal both," as the scrivener says he did, except the claim that the sons knew nothing of the making of a will, which, if true, of course, relieves them from explaining why it was made. This claim, however, is, to put it mildly, also somewhat peculiar. Here is an assertion that the two sons never heard a will mentioned, and knew

absolutely nothing of a will until after the father died, which was some five years subsequent to the making of a will. Now, to begin with, the son William got the man who drew both the deeds and the will. This man says this son came after him, and thinks he wanted him to make out some deeds; that there was something said about the will, about the work in connection with it; that the son took White to make out these deeds; that before they started, White took along a form of will to use as a guide, because William did say there might be possibly something of that kind done; that it was mentioned about it in connection with the business, but White does not remember that anything special was spoken about that until he got to the place. While he was at work, the boys came in two or three times to inquire if testator wanted anything—they just went in and out. The boys paid White, and he believes it was William. To sustain the claim of appellants that they knew nothing of a will until after their father was dead, it must be found, for one thing, that the drawing of the will was not paid for for some five years. William says he was not in the room “when the deeds were drawn,” an emphasis or singling out which makes the absence of like claim as to being absent when the will was drawn somewhat conspicuous, in spite of said general denial of knowledge of a will.

Be that as it may, it is striking that when William says that, at the time of the execution of the deeds, the father said the property was to go “to us boys, all that he had was to go to us,” not a suspicion arose as to whether there was a will, and no inquiry was made as to what was “all that he had.” Again, while the father said nothing about a will, yet he told them they were to pay \$3,000 in legacies; and William insists that, while this was said on several occasions before the will and deeds were made, and shortly after the scrivener left who drew them, nothing was said about a will, and that the agreement to pay what the will gives as legacies

was an independent agreement. But even so, and this again is peculiar, no matter how William learned of the legacies, he does not know whether he has "the property to pay it." As he says, also, that the father left nothing but land, and not over \$1,000 in bank certificates, and as there is no doubt that 300 acres of land would pay the \$3,000 in legacies, the doubt must be whether \$1,000 in bank and personal property existing was sufficient to pay expenses of a last sickness, administration and legacies. If there was no personal estate other than the money in bank, it is not doubtful but perfectly clear that the personal property will not pay these expenses and these legacies.

IV. To the argument that settlement of the contest may be long delayed, and that pending it appellants are no more entitled to administer upon this estate than are contestants,

appellants say there is an agreement for trying the contest within a very short time. Of course, the final decision of the contest will automatically do away with the special administrator. But under our rules, the fact that a cause for appeal has ceased to exist requires dismissal rather than reversal. The possibility that soon there will be no special administrator may have bearing on whether it is necessary to review his appointment, but affords no reason for reversing the appointment.

V. Some reliance is placed upon the fact that, pending appeal, we issued a restraining order. There is reason to feel that the order was improvident because of the provision

in Sec. 3299 that "no appeal from such appointment shall prevent their proceeding in the discharge of their duties." Be that as it may, such order which may be made by any one of the judges of the Supreme Court cannot be held to bind us as to the present decision of the appeal. This is true, first, because an injunction re-

6. EXECUTORS
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7. EXECUTORS
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straining the appointee from acting until it can be determined

whether he has the right to act is, of course,
 8. INJUNCTION :
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 restraining
 orders pending
 appeal : effect
 on final deci-
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 judicata. no attempt to decide whether the appointment
 is rightful,—if it were, the subsequent hear-
 ing and decision of the appeal would be an
 idle form ; second, because the doctrines of

res judicata or *stare decisis* in their strict sense do not apply to incidental or interlocutory orders made in the progress of a cause. Black, Judicial Precedents, page 280 ; 2 Black, Judgments, 2d Ed., Secs. 691, 692.

The judgment below should be, and it is—*Affirmed*.

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

E. H. FLANNERY, Appellee, v. INTERURBAN RAILWAY COMPANY,
 Appellant.

NEGLIGENCE: Crossing Railway Track Ahead of Approaching Car—

- 1 **Street Railroads.** Observing an approaching car as one nears a street railway crossing does not, on the question of negligence, necessarily demand a stop and wait before attempting to cross.

PRINCIPLE APPLIED: Collision at street railway crossing. There was evidence: That plaintiff, going east in an auto, traveling twelve miles per hour, was 70 feet from a street railway crossing when he first saw the car at an alley, 180 feet to the north, and approaching at apparently the same speed; that plaintiff did not stop or then slacken speed, because he thought he had ample time to clear the crossing; that the car had just previously stopped two car lengths north of the alley and, owing to its mechanism, could not be started with a rush; that from the alley south, the street was slightly down grade; that within 12, 25 or 40 feet of the crossing, plaintiff discovered that the street car was going faster than he had supposed, and the clutch and foot brake, but not the emergency, were applied; that no gong was heard; that plaintiff's car could have been stopped within 20 or 30 feet. The ordinance speed limit, applying to the street railway only, was not to exceed twelve miles per hour. *Held*, the question of plaintiff's contributory negligence was for the jury.

NEGLIGENCE: "Stop, Look and Listen" Rule Inapplicable When
2 Train Is Seen—Street Railroads. The "stop, look and listen" rule has no application where the injured person saw the approaching train, the issue being whether he acted with reasonable prudence in attempting to cross the track ahead of the train.

STREET RAILROADS: Expiration of Franchise—Continued Use of
3 Streets—Ordinance Limiting Speed—Validity. A holding of the court of last resort that, under an ordinance, the *franchise* of a street railway company had expired, does not impliedly repeal a section of the said ordinance limiting the speed of cars when the company availed itself of an order of court granting it permission to occupy the streets for a named period in which to negotiate a new franchise.

NEGLIGENCE: Evidence—Inadmissibility to Prove Negligence Not
4 Pleaded—When Otherwise Admissible. Evidence inadmissible to prove negligence on the part of defendant, because not pleaded, may yet be admissible to prove plaintiff's freedom from contributory negligence.

PRINCIPLE APPLIED: The plaintiff pleaded that defendant was negligent on the one ground that the speed of the car was excessive. Plaintiff testified that he heard no warning signals from the car and that none were given. *Held* proper when specifically limited to the question of plaintiff's contributory negligence.

EVIDENCE: Conclusions—Exclusion. Questions calling for the mere
5 conclusion or speculation of a witness should be excluded.

PRINCIPLE APPLIED: The witness, testifying as to her operation of an auto, stated that her husband said: "My God, it (a street car) is going to strike the children." The witness was then asked: "He saw apparently that you could not control the car?" *Held* properly excluded, because calling for the conclusion of the witness as to what the husband apparently saw.

EVIDENCE: Negligence—"Belief" as to Absence of Danger—Com-
6 petency. One's "belief" as to the absence of danger may be competent testimony. For instance, one may properly testify that, in proceeding toward a street railway crossing, with an approaching car in sight, he "believed there was no danger."

Appeal from Dallas District Court.—HON. J. H. APPLEGATE,
 Judge.

TUESDAY, SEPTEMBER 21, 1915.

ACTION to recover damages claimed to have resulted from a collision between plaintiff's automobile and one of defendant's cars. Judgment in the court below for the plaintiff. Defendant appeals.—*Affirmed.*

Parker, Parrish & Miller and *Arthur G. Rippey*, for appellant.

E. J. Kelley, for appellee.

GAYNOR, J.—On the afternoon of June 16, 1913, about 3 o'clock, the plaintiff and his wife and children were riding in an automobile. The wife was driving and plaintiff was sitting by her side. The children were in the rear seat.

The defendant is an interurban railway company and was operating one of its interurban cars on the streets of Des Moines. At this particular time, it was operating its car on Fourteenth Street. Fourteenth Street runs north and south. Capitol Avenue runs east and west. The plaintiff was proceeding eastward on Capitol Avenue. Defendant's car was proceeding southward on Fourteenth Street. At the intersection of these streets, the collision occurred of which complaint is made. In the collision, the plaintiff claims that he and his wife were injured, and his automobile damaged. He brings this action to recover all the damages sustained, his wife having assigned to him her claim for damages against the company.

The negligence charged against the defendant company is that it was running its car, at the time of the collision, negligently, in that it was driven at a dangerous rate of speed as it approached the crossing over which plaintiff was required to pass, and that the speed at which it was operated was in violation of the ordinance of the city, reading as follows:

"No car shall run at a greater rate of speed within the business portion of the city than eight miles an hour, nor

shall the same be run in any other portion of the said city at a greater rate of speed than twelve miles an hour.''

Defendant's answer to plaintiff's claim is a general denial. Upon the issues thus tendered, the cause was tried to a jury and a verdict returned for the plaintiff, and judgment being entered thereon, defendant appeals.

It appears that, at the conclusion of all the testimony, the defendant filed the following motion for a verdict in its favor upon the record as made:

1. There is no sufficient evidence upon which the jury would be warranted in returning a verdict against the defendant in this case.

2. There is no sufficient evidence which would warrant the court in submitting the question of the defendant's negligence to the jury in this case.

3. Under the evidence in this case, if a verdict were returned against the defendant by the jury, it would be the duty of the court to set such verdict aside.

4. The evidence in this case fails to show that the plaintiff or his wife or the driver of the automobile in question was free from contributory negligence.

5. The evidence in this case affirmatively shows that the plaintiff or his wife or the driver of the automobile in question was guilty of negligence which directly contributed to the injuries sued on and claimed in this action.

This motion was by the court overruled, and this action of the court is assigned as error. The correctness of the ruling depends upon the evidence before the court, at the time the motion was made. This evidence, so far as material, is substantially as follows.

We recite first the evidence about which there is practically no controversy in the record.

Capitol Avenue, on which plaintiff was driving, is 32 feet between the curbing. Fourteenth Street is 34 feet wide,

substantially, and the distance from the center of defendant's track to the curbing east is 17 feet, 2 inches. From the center of the track to the curbing west is 17 feet, 3 inches. There is an alley opening on the west side of Fourteenth Street, north of Capitol Avenue. This alley is 18 feet wide. From this alley to the north curbing on Capitol Avenue is 156 feet, and the distance from the alley to the south curbing on Capitol Avenue is 188 feet.

1. NEGLIGENCE: crossing rail-way track ahead of approaching car: street rail-roads.

Plaintiff and his wife claim that they were on Capitol Avenue, 60 or 70 feet west of defendant's track, at the time they first saw the defendant's car; that defendant's car was, at that time, at or north of the alley; that plaintiff was driving his car three or four feet off the south curbing,—that is, the south side of the automobile was three or four feet from the curb line on the south side of Capitol Avenue; that they continued to drive in that position until immediately before the collision. Plaintiff testifies that he had a speedometer on his automobile; that he looked at it while proceeding eastward on Capitol Avenue, and saw and remembers that the automobile was traveling less than twelve miles an hour. Defendant's car, then, must have traveled approximately 180 feet while plaintiff's car was moving 60 or 70 feet. In order to bring about the collision, defendant's car must have been traveling approximately about three times as fast as plaintiff's car. If plaintiff's car was traveling, as he says, at twelve miles an hour, defendant's car must have been traveling approximately 35 or 36 miles an hour. Assuming that the defendant's car was at the south side of the alley when first seen by plaintiff, and assuming that plaintiff was 70 feet from defendant's tracks at that time, and assuming that plaintiff's car was three feet in width (although there is no evidence of the width of the car), we have this state of the record: The north side of plaintiff's car was six feet from the south curb line of Capitol Avenue, or 26 feet from the north curb line of Capitol Avenue. The north

curb line of Capitol Avenue is 156 feet from the south line of the alley. The north side of the car then would have been 182 feet from the south line of the alley, or 182 feet south of defendant's car at the time it was first seen by the plaintiff. Defendant's car must have passed over a distance of 182 feet while plaintiff's car was passing over a distance of 70 feet. Defendant's car was then traveling two and three-fifths times as fast as plaintiff's car. If plaintiff's car was traveling at 12 miles an hour, defendant's car must have been traveling at least 31 miles an hour.

The evidence discloses without controversy that defendant's car came from the west on Grand Avenue and turned to the south at that point on Fourteenth Street; that when the car turned from Grand Avenue onto Fourteenth Street, it stopped, with the front end of the car about 52 feet south of Grand Avenue, on Fourteenth Street. The distance from the south curb line of Grand Avenue to the south side of Capitol Avenue is 354 feet. The south end of the car must then have been 302 feet from the south curb line of Capitol Avenue when it started south. At the time the car started, it was about 114 feet north of the south side of the alley, the point at which plaintiff first claims to have seen the car. The car then must have run about twice its length at the time it was first seen by the plaintiff. Defendant's car was about fifty-two feet long.

Plaintiff claims that, at the time he first saw the car, it appeared to him to be not exceeding the speed at which he was traveling, twelve miles an hour. Upon this point, the defendant's testimony shows that you cannot start a car with a rush; that it has an automatic relay that prevents feeding the car too fast; that you can feed it only so fast, otherwise it trips,—the relay trips. The effect of the tripping is to disconnect the power. It throws the current off and you have to go back and start over again. It is apparent, therefore, that in running a car the feeding is regulated by the automatic relay on the car, and that the speed is gradually

increased by this gradual feeding process. If the car passed over the intervening space from its starting point to the point of collision while the plaintiff was traveling sixty or seventy feet at twelve miles an hour, this car must have averaged a speed of at least thirty miles an hour. It would seem, therefore, that it was even exceeding this speed at the time of the collision, because something must have been lost in speed at the starting point.

It is true that estimates of time and distance are very unsatisfactory in determining time and distance. So much depends upon the ability of the witness to make accurate estimates, and upon the observation made at the time; but the eye can locate a point at which a thing is seen with reference to some other definite existing point, and measurements will determine distance. Knowing the point from which two objects start, and the distance over which they pass in meeting, if we can learn, with any definiteness, the speed at which one of the objects was moving, and the distance over which it passed, we can mathematically determine how fast the other object was moving, by knowing the distance over which it passed in reaching the point of collision. This is what we are able to do in this case with some degree of accuracy.

This brings us to a consideration of the grounds on which the defendant asks the court to direct a verdict in its favor. Was the plaintiff or his wife guilty of contributory negli-

2. NEGLIGENCE :
 "stop, look
 and listen"
 rule inapplica-
 ble when train
 is seen : street
 railroads.

gence in not doing other than they did to avoid the collision with defendant's car? Did they act as reasonably prudent, careful persons would act under like circumstances and under the same conditions in which they

found themselves at that particular time? There is no fixed rule by which the conduct of people can be measured in matters of this kind. It is true that this court has said in many cases, speaking of commercial railways, that a railroad track is a signal of danger in itself; that it suggests danger, and

that the care in approaching it should be commensurate with the suggested danger; that it is the duty of parties approaching such danger to use their senses to avoid injury—to stop, to look, to listen. But this rule that a party is required to stop, look and listen does not apply, under all circumstances, to one approaching a street railway track laid upon the streets of a city. Indeed, there is no hard and fast rule with respect to these matters. It would be idle to apply it here. They saw the car coming; they could have stopped. Looking and listening would have added nothing to what they already knew. The only thing that excuses the conduct of these parties is the speed at which defendant's car was being moved. They say that when they saw it, it appeared to them not to be exceeding the speed at which they themselves were traveling; that if that were true, they had time to pass beyond the track several feet before the car could reach the point at which they desired to cross. It stands to reason, and the record tends to support it, that, at the time the car reached the alley, it was not going at any considerable rate of speed. It had not proceeded southward to exceed 114 feet at that time. The speed must necessarily have been greatly accelerated from that point on. That the motorman was increasing the speed of the car was not observed by the plaintiff or his wife until after it got so near that they were unable to extricate themselves from the peril.

On Fourteenth Street, there is a fall to the south of 10 inches to 100 feet between Grand and Capitol Avenues. Plaintiff's wife, who was driving the car, testifies:

“I saw the car about the alley. It must have been a little north of the alley. We both observed the car at the same time. When we saw the car, we didn't slacken our speed. When our automobile got closer to the track, I saw it was coming down the hill so very fast that it was going to strike. My husband then put his foot on the clutch and told me to put my foot on the brake, which I did. We prob-

ably got over the front car track when we were struck, I don't really know how far it was when we were struck. We were ten or twelve feet from the track when we applied the brake. I applied the brake with my foot and raised myself up in my seat when I saw my car was not stopping, I put my entire weight on the brake. I had operated that automobile before. I stopped it twice on the way coming up that day. The interurban car, at the time of the accident, was running about 30 to 35 miles an hour. My car was running 10 or 12 miles an hour. At the time we first saw the interurban, we were 60 or 70 feet from the track. We saw the car approaching before we were struck."

She was then asked these questions:

"Q. You had seen the car approaching at the time? A. Yes, sir. Q. And going at a high rate of speed? A. What was going at a high rate of speed, the interurban? Q. Yes, the car. A. Yes, but I didn't realize it was going so fast as it was. I never thought it was going very fast when I first saw it, if that is what you mean. Q. Well, you saw it, Mrs. Flannery, and observed the speed at which it was going when you first observed it, didn't you? A. No, I never thought really of its going so fast at first. No, I didn't. Q. When did you begin to think about how fast it was going? A. When I got within about 10 or 12 feet I saw it was going so very much faster than we were, it was going to strike us. Q. There was nothing that obstructed your view of it all that time, was there? A. Well, not after we got—if one is at the south side of Capitol Avenue, you can see about as far as the alley. Q. This approaching interurban car was in sight all the time from the time you first saw it until you struck it? There was nothing whatever to obstruct your view of it? A. No. Q. And yet the question of the speed of that car never occurred to you until you got to within about 12 feet of the track? A. No, sir. I thought it was going about the way we were and it was about

four times as far from the intersection as we were, and we would be about 100 feet on the other side of it at the time it got there. Q. Did you think about that at the time? A. Yes, sir. Q. When you were within 10 feet of the track, you saw the interurban car was about 40 feet from you? A. It must have been. I don't know just about how far it was then. My mind was mostly on my own car then, and not on the interurban. Q. You were trying to get across ahead of it? A. We thought at first we would get 100 feet the other side of it if it was going at the same rate we were, it being about four times as far. Q. Now, you thought about all that at the time, did you? A. Yes, sir. Q. You figured on the rate of speed you were going and on the rate of speed the car was going? A. Yes, sir. We went along about the same rate of speed after we saw the car until we were struck."

She further testified that she knew what a clutch was; that nothing had been done with the clutch until she saw it was going to strike; that they were then ten or twelve feet from the track. The husband put his foot on the clutch and told her to put her foot on the brake, which she did. She testified:

"I did not have my foot on the brake up to that time. It never occurred to me to attempt to do anything with the brake up until that time. It never occurred to me that it would be a safe thing for me to have my foot on the brake. My foot was not directly on the brake. It was half an inch from it. He put his foot on the clutch about the same time I put my foot on the brake. My husband took hold of the wheel and tried to turn the car from the track. I made no attempt to stop the car before my husband told me to put my foot on the brake. There was nothing to prevent me from stopping the car if I had thought that the interurban was going to strike. We both had hold of the wheel at the same time. While he held the wheel, I was turning it with him. We were both trying to turn the wheel. When we both

took hold of the wheel, we were just on the street car track. We were right over the first rail. The motion of our car did not slow up any after my husband had thrown on the clutch, that I remember.”

She further testified that she did not hear any gong sounded prior to the accident.

The husband testified substantially the same as the wife, except that he says:

“When I was about 25 feet from the track, as near as I can estimate,—that is my judgment that I was about 25 feet from the track, when I discovered the speed of this car. Then I put my foot on the clutch and told my wife to get on the brake, which she did, but it was too late. The interurban was then 30 or 40 feet north of me.”

He further testifies that he did not discover the speed at which the car was coming until it was within 20 feet of the north line of Capitol Avenue. It was then he discovered for the first time that it would be impossible to cross in front of the car. “It was then I put my foot on the clutch and told my wife to put her foot on the brake. When I put my foot on the clutch, the speed of the car slackened to a certain extent. The speed of the car slackened when my wife put her foot on the brake, but it did not slacken fast enough. We were not going, at that time, to exceed 12 miles an hour. I know this because I had a speedometer right in front of me, and I watched it at the time. I put my foot on the clutch and my wife put her foot on the brake. The car slackened somewhat. Next, the interurban struck us. I took hold of the wheel just as the car was about to strike us. I turned the wheel so as to clear us of the track.” He said that his best judgment was that his car could have been stopped in 20 or 30 feet. There were two brakes in the car, a foot brake and an emergency brake. The emergency brake was not applied.

There is other testimony as to the speed at which the interurban was moving, and other testimony as to the speed at which plaintiff was driving. There is other testimony as to statements made by plaintiff immediately following the accident, tending to contradict his testimony herein set out, all of which is denied by plaintiff in rebuttal. It is not our province to settle the controversy in the testimony. If there is credible evidence sufficient to justify the verdict, we do not interfere. Under the record as made, we think that the court did not err in overruling defendant's motion for a directed verdict. Under the record, the jury might well have found that the plaintiff and his wife, acting as reasonably prudent persons, had reason to believe, and did believe, from their observations made at the time, that they had plenty of time to cross the track in safety. As said in *Ward v. Marshalltown Light Co.*, 132 Iowa 578, a case quite similar in its facts to the one at bar:

“With respect to plaintiff's freedom from contributory negligence, the evidence tended to show that, at the curb line, before attempting to cross the street, he saw the car which caused the injury approaching him at a distance of about a block and a half; and, without further attention to the car, he proceeded to cross the street, and when he reached the defendant's track, twelve feet from the curb line, he was struck by the car; that the car was running at a speed of thirty miles an hour, whereas, under the provisions of the city ordinance, its speed should not have exceeded twelve miles per hour; and that the motorman gave no signal nor warning until his car was so close to plaintiff that he was unable to avoid a collision. It requires no very elaborate mathematical calculation to show that, if the plaintiff saw the car approaching a block and a half away when he was at the curb line, he could have crossed the track in safety before it reached him if it had been going at a rate of speed not exceeding that fixed in the ordinance, while, on the other hand, he was likely to be injured, as he was, if the car was going at twice

that speed. Now, while it has been well said that one about to cross a street car track should take precaution for his own safety (*Bean v. Ry. Co.*, 104 Iowa 563; *Metz v. St. Paul City R. Co.*, 88 Minn. 48), and should not rely upon nice calculation as to whether or not he can cross before a moving car (citing authorities), yet if, under the circumstances as they appear to him, he is justified in believing that he can cross the track in safety, and he is in fact injured by reason of the improper speed at which the car is operated, we can hardly say that his recovery should be defeated by the fact that, if he had looked at the very instant he came into immediate proximity to the track, he might have discovered his danger and avoided it. Under such circumstances, we think the question of contributory negligence is properly left to the jury"—citing authorities.

See *Adams v. Union Electric Co.*, 138 Iowa 487, in which the authorities are again reviewed, and it is said:

"The jury might have found that the velocity of the car was twenty-five or thirty miles an hour. The jury might also have found that, while plaintiff knew it was coming, he was not aware of its excessive speed, and, if so, in the exercise of ordinary care, might have assumed that it was approaching at a reasonable rate of speed."

It is further said:

"If the driver observes a car on the line at such a distance that, in the exercise of ordinary prudence he believes he can safely cross, and, in undertaking to do so, a collision occurs, this cannot be attributed to negligence on his part,"—citing authorities.

The mere fact that one observes a street car in the distance, as he approaches a public crossing on a street, does not require him, arbitrarily, to stop his vehicle and wait for its passage under all circumstances. His right to use the

highway for travel is a legal right which he may exercise, observing, however, that others have an equal right to the use of it with himself. Neither is permitted to expose the other unnecessarily to danger. As said in the *Adams Case*:

“If one were always chargeable with negligence for driving upon a track when an approaching car is in sight, there are many places which could never be crossed without fault. Pedestrians or drivers of teams have as much right to the street as the street car company, and are not required to desist from traveling over any part of it because of the running of cars thereon. All that is exacted is that reasonable prudence, with reference to their operation, be exercised by them to avoid injury, and when in so doing it can be said that they reasonably believed the crossing can be made in safety, they may go over it without laying themselves open to the charge of negligence,” citing cases.

See also *Powers v. Des Moines City Ry. Co.*, 143 Iowa 427.

It is next contended that the court erred in making the record upon which the case was submitted to the jury. The first error assigned on this point is that the court erred in

<p>3. STREET RAIL- ROADS: expira- tion of fran- chise: contin- ued use of streets: ordinance lim- iting speed: validity.</p>	<p>overruling defendant's objection to the intro- duction of the ordinance governing the rate of speed of street cars, and in overruling de- fendant's motion to withdraw the ordinance from the consideration of the jury. We think there is no error here upon which reversal</p>
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can be predicated. At the time the ordinance was offered, the offer was made in these words: “Plaintiffs offer in evidence the first paragraph of Sec. 1313 of the Revised Ordinances of the city of Des Moines as identified, being the first paragraph of Sec. 3 of ordinance 492, and reads as follows:” Thereupon the ordinance was read to the jury. The proper foundation for the introduction of the ordinance was laid. The only objection made by the defendant was to the offer of the book as incompetent, irrelevant and immaterial. No

objection was urged to the offer of the ordinance itself. The objection was overruled.

After the evidence had all been introduced, and after defendant had made a motion for a directed verdict, the defendant moved the court to withdraw from the consideration of the jury the ordinance offered in evidence, on the ground that stated portions of the ordinance were invalid and inoperative because the said ordinance and amendment thereto had been held by the Supreme Court of the state invalid and inoperative. Now while it is true that the Supreme Court, in *State ex rel. County Attorney et al. v. Des Moines City Ry. Co.*, 159 Iowa 259, held that the franchise had expired under which the Des Moines City Railway Company was operating its cars, there is no holding in that case that the provision of the ordinance regulating the speed of cars when operated was repealed. In that case, the court extended the privilege of operating the cars for two years longer. The two years had not expired at the time this trial was had. The speed provision of the ordinance had never been repealed, nor was it by this court held invalid. In fact, that question was not before this court for consideration at all in that case. We think that, while the company continued to operate its cars upon the streets of Des Moines under the privilege granted in the decree extending the time for two years, it was amenable to the ordinance of the city regulating the speed at which the cars should be run. Its rights were not enlarged any by the holding that the franchise under which it was operating had expired.

It is next contended that the court erred in permitting plaintiff and his wife to testify that they did not hear any warning as the car approached, and that no warning was given. This complaint rests upon the thought that the plaintiffs did not charge that as an element of negligence; therefore it was not a matter to be considered by the jury in determining whether or not the defendant was negligent. This is unquestionably true, and, if allowed for

4. NEGLIGENCE:
evidence:
inadmissibility
to prove negli-
gence not
pleaded: when
otherwise
admissible.

that purpose,—for the purpose of showing negligence of the defendant,—it was clearly irrelevant to any issue; but the court, when ruling upon the objection and permitting the testimony, limited it. The court said: “I will admit it, not as bearing upon the question of any negligence on the part of the defendant, but as bearing upon the question of the negligence or want of negligence on the part of the other parties.” The court was of the opinion that it might go to the jury as explaining the conduct of the parties driving the car, and, in its instructions to the jury, expressly so limited it, and said in its instruction:

“The court has permitted the plaintiff and his wife to testify, as witnesses in this case, in substance and to the effect that they did not hear warning given by the employees of defendant in charge of the car on defendant’s track, as it approached Capitol Avenue. You will understand that this is not permitted by the court for the purpose of showing negligence on the part of the defendant, in any failure on its part to give warning of its approach to Capitol Avenue, but is permitted to go to the jury for the jury’s consideration, with the other evidence offered on the trial, as bearing upon the question of whether or not the plaintiff and his wife were guilty of negligence, on their part, in driving the automobile upon defendant’s track in front of said car.”

The court also told them that they might consider this only as bearing upon the conduct of the plaintiff and his wife as they approached the track. As thus limited, we think there was no reversible error in its admission.

The next error is predicated upon the action of the court in sustaining an objection to certain testimony drawn out by the defendant on the cross-examination of Mrs. Flannery. Mrs. Flannery had testified as follows:

5. EVIDENCE:
conclusions:
exclusion.

“At the time my husband got hold of the wheel, he says, ‘My God, it is going to strike the children.’ Q. He saw

apparently that you could not control the car? A. That I could not control the car? (Objected to as incompetent, irrelevant and immaterial, and based upon an assumption of fact not warranted by the testimony. Sustained by the court.)”

It will be noticed that the witness was not asked whether she could control the car or not, but she was asked whether her husband *apparently saw* that she could not control the car, clearly calling for the conclusion of the witness as to what the husband apparently saw, and not for the fact as to whether she could control the car or not. The ruling is so clearly right that we will not follow the discussion.

It is next contended that the court erred in not sustaining defendant's objection to the testimony of the plaintiff Flannery bearing on his conduct just prior to the collision.

6. EVIDENCE:
negligence:
"belief" as to
absence of
danger:
competency.

This testimony is as follows:

“Q. What did you do after you observed the interurban car? A. Well I really didn't do anything at that time because I didn't think there was any necessity for it.”

Defendant moved to strike out all the answer after the word “because,” as a conclusion of the witness and incompetent. The court, in overruling the motion, said:

“Of course, the ultimate thing is for the jury, but it occurred to me that the matter that presented itself to his mind might be proper.

“Q. Why did you not do anything at the time, Mr. Flannery? (Objected to as before and overruled.) A. Because I did not think there was any danger. Q. Why didn't you think there was any danger? (Same objection and ruling.) A. Because I thought I had plenty of time to get across the track.” (Motion to strike the answer out.)

The court remarked: "This simply comes to the question as to whether or not the plaintiffs purposely and knowingly went on there. There is a difference between recklessness and negligence."

Whether the plaintiff and his wife had a right to believe that they could cross in safety was a question for the jury's determination, but what they did in fact believe was a question that they alone could testify to. There were two questions: What were the conditions that attended them at the time? What would a reasonably prudent and cautious person conclude as to the expediency of attempting to cross? There was then the further consideration: Did these parties, at the time, in fact believe that they could cross in safety? That they believed they could cross in safety might rest on a reckless and foolish conclusion. Under the circumstances as presented, a reasonably prudent man might believe that they could cross in safety; yet if the plaintiff, under the circumstances and conditions known to him, knew that they could not cross in safety, it cannot be said that he was deceived by appearances. The question for the jury was: What were the conditions there? What conclusion would a reasonably prudent man come to under the conditions? And what conclusions did these parties come to that controlled their actions? We think there is no error here.

We find no reversible error in the case and the cause is—*Affirmed.*

DEEMER, C. J., LADD and SALINGER, JJ., concur. .

JOHN MARKEY, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, Appellant.

REMOVAL OF CAUSES: Motion—Statutory Time Limit in Which to
1 **Make—When Statute Not Applicable.** An application to remove a cause from a state to a Federal court, by reason of the amount involved, etc., must be made at or before the time when the state

law or regular rule of court requires an answer. (U. S. Comp. Stat., Sec. 1011, Judicial Code, Sec. 29.) This rule has no application when the pleading which creates a removable suit *requires no answer*.

PLEADING: Petition Followed by General Denial—Amendment In-
2 **creasing Prayer for Damages—Non-necessity for New Answer.** An answer denying generally plaintiff's alleged cause of action and all damages automatically applies to a subsequent amendment to the petition which simply increases the demand for damages, thereby rendering needless any additional answer.

NEGLIGENCE: Laches—Knowledge Presupposed—Actual and Con-
3 **structive Knowledge Contrasted.** Less than *actual* knowledge cannot initiate negligent delay. In other words, one without fault in not obtaining actual knowledge cannot be guilty of *laches* for failing to act upon what he knows by construction only. So held where an amendment to a petition gave defendant the right of removal to Federal court, of which right defendant had constructive knowledge only.

PRINCIPLE APPLIED: Plaintiff filed petition in state court with prayer for \$3,000 damages. Defendant filed a general denial. Later, plaintiff amended his petition by asking damages in the sum of \$6,000, thereby rendering the cause removable. Eight days later, without knowledge that the amendment to the petition had been filed, defendant filed a farther answer to the petition, simply amplifying its former answer. Defendant had no actual knowledge of the filing of the amendment demanding \$6,000 damages until thirteen days after the filing, but had that constructive knowledge which all litigants have of pleadings filed. On obtaining such actual knowledge, defendant, without answering thereto, immediately filed petition for removal to Federal court. On question whether defendant was negligent in not sooner petitioning for a removal, *held*, negligence could not be predicated on such "constructive" knowledge.

REMOVAL OF CAUSES: Waiver of Right to Remove—Knowledge of
4 **Conditions—Necessity for.** Waiver of a right presupposes knowledge of the facts giving rise to the right. Applied in instant case, where it was claimed that defendant had waived its right to remove a cause to the Federal court.

PRINCIPLE APPLIED: (See No. 3.) *Held*, defendant did not waive its right to remove by filing its amplified answer.

REMOVAL OF CAUSES: Laches—Filing Petition after Commence-
5 **ment of Trial.** Attention is called to the fact that the filing of a petition for removal of a cause to Federal court *after the commencement of the trial* does not necessarily establish laches.

APPEAL AND ERROR: Abstract of Record—Undenied Allegation—
6 **Precedence over Affidavit.** The statement of an *undenied* abstract that appellant's motion to transfer the cause to the Federal court was filed *before* the commencement of the trial in the lower court must prevail over an affidavit appearing in the abstract as having been filed in the lower court by appellee, wherein the statement is made that such motion was filed *after* the commencement of trial.

REMOVAL OF CAUSES: Negligence in Demanding Removal—Ex-
7 **cusable Failure to Learn Facts.** When plaintiff's own pleading, after answer day, creates a suit removable to the Federal court, defendant need only demand the removal with reasonable diligence. Negligence in asking for the removal cannot be predicated on the mere fact that thirteen days elapsed after the filing of such pleading before defendant actually discovered that such pleading had been filed, when (a) he had no reason to surmise that such a pleading would be filed and (b) moved promptly on making such discovery.

PRINCIPLE APPLIED: (See No. 3.)

Appeal from Dallas District Court.—HON. W. H. FAHEY,
Judge.

TUESDAY, SEPTEMBER 21, 1915.

As reversal is ordered because we hold that the trial court should have granted appellant's petition for removal, our consideration is limited to giving our reasons for reaching said conclusion. The facts will be stated in course of the opinion.—*Reversed and Remanded.*

E. J. Kelley, for appellee.

Cook, Hughes & Sutherland, for appellant.

SALINGER, J.—I. On the 13th day of August, 1913, the plaintiff, appellee, filed petition charging defendant with hav-

ing negligently injured him, and demanding judgment in the sum of three thousand dollars therefor.

1. REMOVAL OF CAUSES : motion : statutory time limit in which to make : when statute not applicable.

On the 21st day of August, defendant filed an answer which is practically a general denial. On the 4th day of November, 1913, the first day of the November term in that year, plaintiff filed a motion for leave to amend his petition by raising the prayer for judgment from three thousand dollars to six thousand dollars. The motion was sustained on the same day, and thereupon, still on the same day, plaintiff filed an amendment, stating that, by reason of the acts described in his original petition, the plaintiff had suffered damages in the sum of six thousand dollars, and asking judgment for said enlarged amount. It is conceded, as indeed it must be, that a removable suit was created at the time when said amendment put the damages sought above three thousand dollars. By Sec. 1011, United States Compiled Statutes, 1913, (Judicial Code, Sec. 29), it is provided that a petition for removal must be filed "at the time, or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." It is settled in this court that whensoever this act of Congress is applicable, its reference to statute or rule time means the time fixed by statute or rule, and not a time later fixed by extension on order of court or stipulation of parties. See *Wilson v. Coal Co.*, 135 Iowa 531. So anything addressed to said amendment to petition was, under statute and court rule, due by the morning of November 5th. The petition for removal was not filed until the 17th day of November, and appellee insists that, therefore, it came too late, and the application to remove was rightly denied. Whether the Federal statute is applicable depends upon whether said amendment to petition required answer, and, if none was required, upon whether it is a proper construction of the Removal Act that its time limit by adoption applies to cases wherein no

answer is required. We may assume that Congress has power to require that a removal must, under all circumstances, be perfected within a stated time after a removable suit comes into existence, but are of opinion that it has not done so. The enactment is that the removal petition must be filed before the time at which the state law "requires answer." This, it seems to us, presupposes a case in which answer is required, and leaves open the question when application to remove must be made where an amendment which needs no answer creates a removable suit.

Was answer required to be filed at all? The petition alleges that certain acts of the defendant injured the plaintiff, wherefore three thousand dollars was due. The general

denial asserts that defendant has done none of these things and that, therefore, neither three thousand dollars, nor, of course, any larger sum, is due. Such answer is, in a sense, anticipatory, so far as meeting any enlarged claim for the same injury is concerned. After

the defendant had denied injuring the plaintiff at all, a subsequent statement that the denied acts had caused more damage than was originally claimed was necessarily met in advance by said denial. So long as there remained a denial of all acts alleged to have caused injury, and of all damage, no additional answer was required to deny that the damage amounted to six thousand dollars.

In *Mann v. Howe*, 9 Iowa 546, we hold that an answer which merely denies the amount of defendant's indebtedness as claimed by plaintiff, without denying his cause of action, does not entitle to a trial, but leaves the one thus answering substantially in default. Since making mere denial that there was an indebtedness in the sum of \$6,000 would be of no avail, and would still leave the maker precisely as though he had made none, it must follow that no such denial is necessary. It cannot be possible that an answer is required which, in law,

2. PLEADING:
petition fol-
lowed by gen-
eral denial:
amendment
increasing
prayer for
damages: non-
necessity for
new answer.

leaves the one making it in default. In *Brown v. Ellis*, 26 Iowa 85, it is ruled that, where there is an answer to the original petition in certiorari, an answer to an amended petition which is but a repetition of the matter contained in the original is not necessary. To the same effect is *Peacock v. Gleesen*, 117 Iowa 291. On the ground that such amendment "changes no allegation of fact," it is held in *City of Topeka v. Sherwood* (Kans.), 18 Pac. at 934, there was no error in refusing leave to answer a complaint amendment raising the amount of damages.

In *Yates v. French*, 25 Wis. 661, the exact point seems to be ruled. There, the complaint was amended by increasing the amount of damages claimed on the facts alleged in the original complaint, and it was held that the answer to the original complaint stands as the answer to the amended complaint, and that it was error to permit plaintiff to take judgment because no answer had been filed to the amended complaint. As said, the original answer here operated as a complete defense on paper to the petition as amended. Therefore, there is no requirement that that which was already pleaded should be repleaded, and by rule time. While the statute does require amendments to petition, generally, to be pleaded to within a time fixed, this has no application to cases wherein no pleading is required. Wherefore, we are constrained to hold that if this removal petition was filed too late, it is because of something other than the time rule adopted by the Federal statute. But as appellee rightly suggests by argument in the alternative, though this statute rule does not govern, there is, of course, a limitation upon the time at which such petition may be effectively filed. Appellee urges that defendant had constructive notice of the steps that ended with the filing of said amendment, and that such notice is of controlling effect.

II. Assume that defendant had constructive notice of the filing of the amendment, and there remains the question

whether such notice has, here, the effect of actual knowledge.

3. **NEGLIGENCE:**
laches: knowl-
edge presup-
posed: actual
and construc-
tive knowledge
contrasted.

Appellee contends that the cases cited for appellant are not authority for the position that, when a party gets constructive notice of a removable suit on November 4th, a petition to remove, filed on November 17th, is timely. That some of these citations are well objected to is true. As is not altogether unusual, both parties indulge in some briefing and argument that is irrelevant. It may be true, though we think it will prove immaterial, that in none of the cases cited is there construed a statute similar to our own. In like case is the claim that the time for effective transfer is not a matter of judicial discretion. *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, is but a decision that one remand is no bar to a second removal if conditions so change as to warrant a second removal. *Northern P. R. Co. v. Austin*, 135 U. S. 315, decides merely that the creation of a removable cause is no basis for complaining of retention in the state court, in the absence of an application to remove. Neither *Daugherty v. Western U. T. Co.*, 61 Fed. 138, nor *Adams v. Puget Sound T. L. & P. Co.*, 207 Fed. 205, is relevant on the effect of constructive notice, because, in each, defendant delayed removing too long after actual notice. We hold in *Wilson v. Godfrey*, 145 Iowa 696, that the record of a regularly conducted tax sale is constructive notice to a subsequent mortgagee of the lien thus created; but that does not touch whether *laches* can be based on constructive knowledge, without more. And so, while *Wagner v. Tice*, 36 Iowa 599, compels a litigant to take notice of motions without notice other than constructive, this reiterates the statute, and again does not rule on whether less than actual knowledge can initiate negligent delay.

In the end, appellee apprehends that no matter what the briefs fail to do, the real question is whether defendant was negligent. So much is conceded by his argument that "plaintiff cannot be held responsible for the negligence of defend-

ant's attorney." The record shows clearly that defendant had no actual knowledge of the amendment until the very day on which it applied for transfer. The matter for decision is, therefore, whether a party, assuming him to be without fault in not obtaining actual knowledge, can be guilty of *laches* for failing to act upon what he knows by construction only. Is one guilty of *laches* who moves as soon as he knows that which calls for action because, before he gets actual knowledge, he has constructive notice which, if actual, would call for action at once? That constructive notice is the equivalent of actual notice in the sense of fixing rights or imposing obligations is undoubted. But how can such notice ever establish *scienter*? The right to remove may be lost, either by failing to obey a mandatory statute rule, by negligence, or by such conduct as implies a consent to remain in the state court. Can one be guilty of negligence, or effectuate a waiver, or give a consent, when actually in ignorance that there is anything to do, waive, or consent to? Suppose the statute made it a felony knowingly to buy mortgaged chattel property. The record of the mortgage gives the buyer of the property covered by it such constructive notice as that his title would be subject to the mortgage though he knew nothing of such record. But will anyone contend that such buyer could be sent to the penitentiary for doing this buying if it were found he had no actual notice of the record? The books all couple the word "guilt" with "negligence" and "laches," and there cannot be "guilt" by construction. To be guilty of negligence for failing to move with diligence as to an existing matter is an affirmative mental condition—involves *scienter*. Constructive notice is notice to all, but it does seem manifest, for instance, that an insane person would not be chargeable with negligence because of failure to act upon what is undoubted constructive notice. Though there were no statutes extending time to sue until the disability is removed, constructive notice to a lunatic could not base *laches*.

In essence, the position of appellee is that one may be

negligent because he is not controlled by the existence of something of the existence of which he is unaware; that a litigant knows what he does not know, merely because filing is, for some purposes, the only notice to which he is entitled. We think the authorities rightly recognize a distinction between the effect of constructive notice in creating rights and priorities and its availability as basis for charging negligence, and that appellee ignores this distinction.

Not many, if any, of the cases speak to the precise question. In dealing with circumstances like those at bar, most of them stop with the statement of the general proposition that filing of the petition to remove is in time if that be done as soon as it becomes known that a removal suit exists. *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 101; 2 Bates, Fed. Proc. Sec. 819; *Boatmen's Bank v. Fritzlen*, 89 Pac. (Kan.) 915; Black's Dillon, Removal, Sec. 155; *Enders v. Lake Erie & W. R. Co.*, 101 Fed. 202. They hold that applicant must move promptly after he is advised that there is occasion to move. *Yarde v. Baltimore & O. R. Co.*, 57 Fed. 913, 915. He must exercise reasonable promptness. *Enders' Case*, 101 Fed. 202. All these leave open the application of their rule. To use the words of *Enders' Case*, "What is the degree of promptness that must be exercised?" Speaking concretely, is defendant negligent merely because he does not file petition to remove for thirteen days after he has constructive notice that he has the right to remove, though he files as soon as he has actual notice of such right?

In *Jameson v. Rixey*, 26 S. E. (Va.) 862, right column, in which, as will presently appear, there was unquestioned constructive notice, it is said to be elementary doctrine that laches cannot be imputed to one who is ignorant of his rights. The rule, upon which much stress is laid—that a party properly brought into court is chargeable with notice of all subsequent steps taken in the case down to and including the judgment, although he does not in fact appear, and has no actual notice thereof—is a general rule. 29 Cyc. p. 1116 (B). It

was undoubtedly not ignored in the *Jameson Case, supra*. But, notwithstanding its existence, the plaintiff in that suit was held not guilty of laches for delaying the assertion of a decree twenty years, she having brought the suit within two years after learning of her lien by having occasion to examine the record in the suit in which said decree had been entered in her favor.

To a certainty, the rule that a suitor is charged with constructive notice of the steps taken in his suit is not better established than that rule which charges all men with having knowledge of the law. Yet a plaintiff has been allowed to withdraw a pleading filed by him in Federal court, to which the suit had been removed, and to file motion to remand, where it was made to appear that he had pleaded, and failed to move for remand, because he was ignorant of a certain construction of the removal statute on the part of the Supreme Court. See *Collins v. Stott*, 76 Fed. (Conn.) 613, approved in Black's Dillon on Removal, Sec. 154.

Fogarty v. Railway, 121 Fed. (Cal.) 941, is, in our opinion, substantially in point. There, the plaintiff notified defendant on February 7th that on that day he would move to set the case for trial. Plaintiff appeared and moved the dismissal of the action against one Nelson, whom plaintiff had joined as a defendant with the defendant railway company. On this 7th day of February, dismissal as against Nelson was granted by an order entered in the minutes, and thus a removable suit created. The defendant company was unrepresented on that occasion, "and, so far as the record shows, was at no time notified of the dismissal of the action as against its co-defendant Nelson." Thereafter, the defendant company presented petition and bond for removal. The time of this presentation does not appear in the record. Nor does it appear when this defendant first learned of the dismissal of the action as to Nelson. While, as said, it does not appear just when the petition and bond were filed, it does appear that the motion to remove was granted on February 26th,

twenty-one days after the entry of order dismissing the action against Nelson. On motion to remand, it was held that the application to remove was made within a reasonable time after the right of removal arose. Clearly, this decision does not adopt the view of the appellee as to the effect of constructive notice. It is safe to assume that the Federal court passing upon *Fogarty's Case* did not act in ignorance of the general rule affecting the suitor with notice of the steps taken in his suit. Nor may it well be claimed that an order of dismissal entered in the minutes, and creating a removable suit, did not impart constructive notice as effectively as the filing of an amendment to a petition. We think the *Fogarty Case* proceeds upon sound lines in the treatment of the effect of constructive notice as bearing on laches.

III. Something is claimed for the fact that defendant filed an amendment to its answer on November 12th—eight days after plaintiff filed amendment to petition, and five days before defendant filed petition for removal.

4. REMOVAL OF
CAUSES: waiv-
er of right to
remove: knowl-
edge of condi-
tions: neces-
sity for.

This amendment to answer was not in response to plaintiff's amendment to petition. It was a mere amplification of the general denial, in that it set out some reasons why defendant was not liable. It was filed in ignorance that plaintiff had amended his petition. The amendment itself was never answered. We think this point is disposed of by what we have said in division II. If being in fact without knowledge that plaintiff had filed an amendment precludes laches until such knowledge is, in reason, obtained, no right to remove can well have been waived by filing a pleading in ignorance of plaintiff's amendment. A similar point arose in the *Fogarty Case, supra*. The attorney for defendant had unsuccessfully applied for a change in the time of trial fixed, and it was there said: "As no notice of the dismissal appears to have been given and the request for change of time of trial was, so far as appears, made in ignorance that the right to remove had come into existence, there was no waiver of the

right to remove by its verbal application for a change of time."

IV. It is suggested, in a way, that the application came too late in any event, because it was not made until after the trial of the instant case had been begun. We are not pre-

pared to hold that the mere fact of not filing a petition for removal until after trial in the state court is begun would necessarily establish laches. The right to remove after amend-

5. REMOVAL OF CAUSES: laches: filing petition after commencement of trial.

ment creates a removable suit rests upon estoppel by conduct of plaintiff which prevents his insistence upon the time rule which would apply if such a suit had been created by the original petition. Consequently, if any act of plaintiff delays filing petition for removal past the beginning of trial, he would be as much estopped to urge this delay as any other for which he was blamable. No such time limit as this can be established as matter of law. Passing that, this record

fails to show that the trial had begun when the removal petition was filed. There is no evidence of this except an affidavit by counsel for plaintiff which states, as a conclusion, that the filing was not had until after trial had begun. This, however, is weakened because of the accompanying statement of fact that the petition was filed "when the cause had proceeded to trial and the work of empaneling a jury was about to begin." It is difficult to apprehend just how the trial had been begun at a stage of the case when the empaneling of the jury "was about to begin." At any rate, the utmost this comes to is a showing by the abstract that counsel made such affidavit. The abstract, which is not challenged in any way, recites that defendant filed the petition on November 17th, that the court overruled it, and that "thereupon this cause was called for trial on the 17th of November, 1913." The making of affidavit by counsel to the effect stated cannot overthrow the record as thus made by the abstract, which

6. APPEAL AND ERROR: abstract of record: undenied allegation: precedence over affidavit.

establishes that trial was begun after the application to remove had been denied.

V. The epigrammatic statement that if constructive knowledge "is not knowledge for a period of seventeen days it would not be knowledge for any period" has two edges. It may mean that one minute of constructive notice is as potent as many days of such notice, or that one may be negligent by waiting too long in getting actual knowledge of a record which imparts notice by construction. The first interpretation furnishes a strong argument against appellee. When no plea is necessary, the statute which requires plea to be made by, and therefore gives time to plead until, the morning after that is filed which is to be pleaded to, does not govern. Therefore, a single minute of constructive notice will initiate negligence, and there would result the unthinkable requirement that defendant must mount guard in the court room and clerk's office during every moment they remain open, so that he may not sin away the right to remove by failing to act instantaneously upon the filing of an amendment which creates a removable suit.

The other interpretation to which the words of appellee are susceptible asserts rightly that one may be negligent by delaying action until he has actual knowledge of a record which makes action due. Our holding that mere constructive knowledge is not enough to establish negligence does not relieve the party who remains ignorant of the record because he fails to exercise the diligence required by ordinary care and prudence. One may be guilty of inexcusable neglect in proceeding on the erroneous theory that a judgment against him is based on a return of personal service, when the return shows substituted service, and there is no excuse for the failure to examine the return. *Myrick v. Edmundson*, 2 Minn. 259. It is held in *Teall v. Slaven*, 40 Fed. (Cal.) 774-780, that where a deed, alleged to be fraudulent, bears evidence of fraud upon its face, and has been of record for thirty years, it affords just as strong evidence of fraud to

the parties defrauded as it does to subsequent purchasers, although statutory constructive notice operates as to such purchasers only. While the rights of the defrauded ones are not affected by constructive notice, they are affected by lack of diligence "in asserting their rights and pursuing their remedies."

So we reach the pivotal question: Is there anything in this record which justifies a finding that defendant was negligent in failing to learn the state of the record earlier than it did? Of course, the exercise of absolute

7. REMOVAL OF CAUSES: negligence in demanding removal: excusable failure to learn facts.

diligence and care, mounting guard in the way before pointed out, would have advised of the filing on the instant of the filing. But negligence in law is not made out by failure to employ absolute care. The erection of high walls on both sides of a railroad track and employing effective guards at every crossing would practically prevent the injuring of trespassers. But the absence of such walls and guards does not establish actionable negligence. And the law of negligence is, for all practical purposes, a set of rules defining how far absolute care may be departed from, without liability. Negligence is not failure to do all possible, but failure to do what ordinary prudence dictates—and this is the standard which defendant must meet. In taking no steps to learn of this filing, did it fail to do what persons of ordinary prudence should and would have done in the circumstances? In the general sense, that it would be bound by amendments made whether it had actual knowledge of them or not, defendant was bound to ascertain what amendments were filed; but it was not negligent for failing to look out for amendments which it had reasonable cause to believe would not be filed. So, for instance, and despite constructive notice and the absence of requirement to give actual notice of filing, it would not be negligence to get no knowledge of an amendment, had there been stipulation that none should be filed. Though the party is affected with notice of all done up to final judgment,

we have always annulled a change in an announced ruling made without actual notice. To make negligence, here, defendant should (1) have been in reason bound to anticipate amendment as to amount of recovery, or (2) have anticipated what, in a sense, is a fraud.

Some time in August, plaintiff, apparently knowing all the injuries he had sustained, filed a demand for three thousand dollars, exactly the highest amount that would avoid removal. We do not say that such was the purpose of fixing the *ad damnum*, but may properly say, as bearing upon the diligence of defendant, that the amount of damages sought to be recovered in tort cases is often limited so that there may not be a removal to the Federal court, and that defendant here might not unreasonably assume that the one thing plaintiff would never do would be to amend himself into a removable suit. We have held that, though a newspaper publication complies literally with the statute, yet, if publication be made in an obscure paper in the hope that the defendant will not see the notice, this amounts to a fraud, although the letter of the statute has been complied with. So, if this plaintiff, indulging in a literal compliance with the statute, deliberately filed this amendment without giving actual notice, in the belief that defendant had reason to think none such would be filed, and with intent to keep defendant from being advised of the filing until it was too late, this, too, within the analogy of the aforementioned method of notice by publication, would operate as a fraud, although the filing did, for some purposes, give constructive notice. We do not say that plaintiff was actuated by any such motive, but wish to make clear that defendant should not be held to be negligent because it took no precautions to guard against filing with such motive. It does not lie in the mouth of plaintiff to say that defendant was guilty of laches because it refused to suspect the possibility of plaintiff's being guilty of fraudulent practices.

We are of opinion that, if the filing of plaintiff's amendment did give constructive notice, it was not here the equiva-

lent of actual notice; that constructive notice alone will not base negligence for failure to act upon such notice, and that the defendant was not negligent in obtaining actual notice. It follows that there was no unreasonable delay in the filing of petition and bond for removal, and that the trial court erred in overruling said petition. The judgment appealed from is reversed, and the order overruling the application to remove is annulled and reversed. The district court of Iowa, in and for Dallas county, has lost jurisdiction of this cause, and will proceed therein no further, save to grant the removal as prayed, for which purpose the cause is remanded.—*Reversed and Remanded.*

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

G. N. MILLER, Appellee, v. HARRISON COUNTY, IOWA,
Appellant.

APPEAL AND ERROR: Predicating Error on Invited Action of
1 Court. One may not invite the court to proceed on a certain theory and then, after the court has accepted the invitation and acted, predicate error thereon.

PRINCIPLE APPLIED: Plaintiff, in a buggy, was driving down hill. The neckyoke broke, the tongue fell, the buggy crowded upon the horses, the team became frightened, ran away, went upon the graded approach to a bridge, the buggy swerved, went off the grade, barely missing the bridge, and plaintiff was injured. The bridge had been constructed narrower than the law commanded. Whether this negligence was the proximate cause of the injury was problematical, but defendant asked the court to instruct the jury to pass upon the question *whether the narrowness of the bridge was the proximate cause of the injury*. The court complied with the request. The jury found in the affirmative. *Held*, the defendant could not predicate error on such action of the court.

BRIDGES: Approaches—Failure to Maintain Barrier—Negligence.
2 The failure to maintain a railing or barrier along the *approach* to a bridge may constitute negligence. Much depends on whether

the situation is such as to indicate danger of being precipitated over the embankment without such barrier.

EVIDENCE: Expert Opinion—Suitableness of Neckyoke. A black-
3 smith, shown to be qualified, may properly testify that a certain
neckyoke was suitable for the use to which it was being put
and was the best made.

EVIDENCE: Expert Opinion—Physicians—Probable Result of In-
4 **juries.** A physician who has personally examined and treated an
injured person may give an opinion as to what will be the nat-
ural and probable result of the injuries.

TRIAL: Instructions—Basis, Sufficiency of. Where there was evi-
5 dence tending to show that an injured party had acknowledged
having an insecure neckyoke and had used it on the occasion
when he was injured, *held*, the record justified an instruction to
the jury to determine whether the acknowledgment had reference
to the neckyoke used on the occasion when the party was injured
or to some other neckyoke.

Appeal from Crawford District Court.—HON. M. E.
HUTCHISON, Judge.

TUESDAY, SEPTEMBER 21, 1915.

ACTION for damages alleged to have been caused by a
defective bridge and want of railing resulted in judgment
against the defendant, from which it appeals.—*Affirmed.*

C. W. Kellogg, Dewell & McLaughlin, and Sims &
Kuehnle, for appellant.

H. L. Robertson and Harding & Kahler, for appellee.

LADD, J.—The highway extended east and west over a
creek or stream, over which was erected a county bridge 54
feet in length. The plaintiff resided at the top of the hill
about 200 yards west of the bridge. There was a gradual
5 per cent. descent in the highway towards the bridge.

In the evening of January 17, 1913, plaintiff, with his
team and buggy, accompanied by his wife, started for Wood-
bine; and upon reaching the road the neckyoke broke and let

the tongue fall to the ground. The plaintiff attempted to stop the horses, but the buggy running against them started them, and as they went towards the bridge this was repeated several times. According to plaintiff's testimony, when near the west end of the bridge the tongue and buggy turned to the north, going down a high embankment to the creek below, injuring the plaintiff, while the team went on the bridge and stopped. The petition alleges that plaintiff was without fault, and that defendant was negligent, (a) in constructing and maintaining the bridge and approach too narrow, that is, 13 feet 6 inches wide, and (b) in omitting to place railings or guards along the approach so as to protect travelers against the danger in its use as well as that of the bridge. Appellant contends that the evidence was insufficient to carry the last two issues to the jury.

I. The bridge at the west end was 13 feet, 6 inches wide and the top of the fill, 11 feet and 10 inches wide. This fill was about 30 inches above the natural surface of the ground and extended westerly 34 feet from the bridge. The end of the bridge was set back on the bank somewhat and rested on mud sills, consisting of four planks. From the northwest corner of the bridge, the ground, for about 5 feet and to the bank, was nearly level, and from there on, the fall was abrupt down to the stream, many feet. There was a tree about 6 feet north of this corner of the bridge, and the fill next the bridge began to slope from about 18 inches south of the north edge of the bridge. The testimony in behalf of plaintiff tended to prove that the tongue of the buggy did not turn off the approach until it was very near the bridge,—one witness estimated the distance as low as a foot,—and that the right wheel of the buggy passed not farther than 15 to 18 inches north of the northwest corner of the bridge. The evidence of the defendant tended to show that the buggy must have left the grade farther to the west; but the jury might have found the facts to have been as recited, and if so, that, had the bridge been of the width exacted by statute, the tongue might not

have left the grade as it did, and that the buggy would have caught on the bridge railing and, in view of the nature of the ground and the location of the tree, that the injury might have been averted.

It is argued that even if the wheel would have caught the railing, the probability of plaintiff's not being thrown on the ice below is remote and conjectural, and therefore ought

not to have been left to the jury. Of course, the defendant was negligent in that the board of supervisors in 1903 constructed the bridge in utter disregard of the requirement of law

1. APPEAL AND
ERROR: predi-
cating error
on invited ac-
tion of court.

that it be at least 16 feet wide, but this does not aid in ascertaining whether such negligence was the proximate cause of the injury. Had the defendant consistently insisted upon the position now being taken, we should have experienced much difficulty in determining the issue; but at the trial it requested at least two instructions, submitting the issue to the jury. We quote from the last, which, in substance, was incorporated in instructions given by the court:

"But you are instructed that the burden is upon the plaintiff to show, not only that the bridge in question was less than sixteen feet in width, but that if the bridge had been in fact sixteen feet in width, not only would the right fore wheel of plaintiff's buggy have caught on the same, but also if it had so caught on or struck said northwest corner of the bridge the accident would have been averted and the plaintiff would have escaped injury. In other words, as elsewhere in these instructions explained, unless the plaintiff shows by a fair preponderance of the evidence that the fact, if it be a fact, that the bridge was less than sixteen feet in width, was one of the contributing causes to the accident and injury of the plaintiff, there can be no recovery by the plaintiff."

Having induced the court by requested instructions to submit the issue to the jury, or thereby indicating its acqui-

escence therein, a party cannot thereafter raise objections to the action of the court in adopting what he has proposed. *Light v. Railway*, 93 Iowa 83; *Spicer v. Webster City*, 118 Iowa 561; *Campbell v. Ormsby*, 65 Iowa 518; *Hahn v. Miller*, 60 Iowa 96; *Fenner v. Crips Bros.*, 109 Iowa 455.

II. There appears to have been an adequate railing on the bridge, and the court submitted to the jury whether, in the exercise of reasonable diligence and care, the officers of the defendant should have placed a barrier or guard along the approach. Appellant contends that the evidence was not such as to raise this issue. It will be recalled that the approach was down a steep hill; that immediately west of the bridge the grade had been raised considerably above the surface; that a ditch had been washed on the north side of the grade; and that the bank of the stream was rough and steep and extended in a northwesterly direction very near the corner of the bridge. In the event of any mishap with vehicle or team in passing on the grade or otherwise, which might turn the traveler from the beaten track, the situation was such as to indicate danger of being precipitated over the embankment. This could have been guarded against by a barrier or guard at small expense, extending but a short distance, and we are of the opinion that it was for the jury to say whether the defendant, through its officers, in the exercise of reasonable care for the protection of travelers making use of the highway, ought to have constructed such guard rail or barrier along the approach. Though the danger to be guarded against was the abrupt descent from the embankment, the court rightly advised the jury that the defendant was under no obligation to extend a railing along the stream. Such, of course, might have obviated the necessity of a guard rail along the fill, but it was the approach to the bridge along which the defendant was bound to protect travelers against dangers incident to leaving such approach, if such protection was required. We are of the opinion that the issue was rightly

2. BRIDGES:
approaches:
failure to
maintain bar-
rier: negli-
gence.

submitted to the jury, and it was for that body to say not only whether there should have been a barrier, but whether, had there been such, the injury to plaintiff would have been averted.

III. The occupation of the plaintiff was that of farmer and blacksmith. He testified that he had bought the neckyoke which gave way about a year before, that the center fastening

3. EVIDENCE: expert opinion: suitability of neckyoke. was a ring with a swivel bar and a bar underneath; that he had been repairing neckyokes and using them for 15 or 20 years and was familiar with the different kinds; and he was then asked: "What do you say, Mr. Miller, the fact is as to that being one of the best and safest and latest kinds of neckyokes in use in that part of the country at that time?" An objection as calling for a conclusion of a witness was overruled, and the witness answered: "To my judgment they are the best neckyokes that is made in these later days. It is the best attachment to the tongue." The witness had qualified as an expert, and though the question was perhaps somewhat extreme, his answer indicated that the witness had reference to the kind or class of neckyokes and the attachment thereto. Whether it was suitable for the purpose and such as was being used was clearly competent, and there was no error in the ruling.

IV. Dr. W. S. Payne treated the plaintiff during his sickness, and testified that he had two ribs, on the left side, fractured, a laceration of the ligaments of the back, and a

4. EVIDENCE: expert opinion: physicians: probable result of injuries. contusion of the abdomen, and was then asked, "What would be the natural and probable result of an injury of that kind to the rib that you have described?" This was

objected to as calling for a conclusion and not being the subject of expert testimony; also that it called for the fact and not the present condition, and was not confined to the case in question. The objection was overruled; and the witness testified that, "Ordinarily, those ribs will unite and become strong. . . . In many cases the end of the rib might have pressed

the pleura, causing pleurisy, and after the pleurisy had subsided might have caused adhesion of the pleura that would give him some trouble in the future." There was no error. The witness was testifying as an expert and therefore might express his opinions, and moreover it was competent for him to testify as to the probable future condition of the patient in consequence of the injuries received. The inquiry was confined to the case, inasmuch as he was telling the probable consequences of injuries of that kind. The authorities supporting the proposition are too numerous for citation.

One Barnum testified that he reached Miller shortly after the accident, when the latter said, "If the old neckyoke hadn't broke it would not have happened," and that Barnum responded, "I told you last spring that you was using that too long," when plaintiff replied that he ought to have got a new one. Barnum went on: "I had seen that neckyoke before along the fore part of March, and had warned Miller that the neckyoke ought to be discarded, that it was too badly worn for use, and Miller had said that he was not able to get a new one." Miller denied both conversations entirely, and testified that he bought a new neckyoke about a year before the accident. The court, among other things, instructed that the jury might take into consideration the conversation had, if any, between plaintiff and Barnum, and whether "the plaintiff had reasonable grounds to believe that said neckyoke was in an unsafe condition, and whether the talk, if any, between said Albert Barnum and the plaintiff had reference to the neckyoke used by the plaintiff at the time of the accident, or whether it had reference to some other neckyoke." Appellant excepts to this instruction on the ground that there was no evidence that any neckyoke other than the one used at the accident was referred to. As Barnum described the neckyoke as one very old and nearly worn out, and the plaintiff testified that he was using a neckyoke purchased a year previous, which was in good condition, the jury might have inferred that

5. TRIAL: instructions: basis, sufficiency of.

they were talking about different neckyokes, and therefore there was no error in the instruction. Some other matters are discussed, but they do not require further attention, and the judgment is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

SARAH WHITMAN, Appellant, v. CHICAGO, GREAT WESTERN
RAILWAY COMPANY, Appellee.

TRIAL: Instructions—Invading Province of Jury—Negligence. The

1 court must not, in its instructions, even inferentially, invade the province of the jury. So held where the court, by inference at least, told the jury that the actions of an injured person, in view of certain knowledge, and the failure to do certain things, constituted negligence.

PRINCIPLE APPLIED: Plaintiff was injured by falling down the steps leading from a railway depot. On the question of negligence, the court instructed (*italics are ours*): “In determining whether or not the plaintiff exercised such reasonable and ordinary care, it is proper for you to consider the number of times plaintiff had passed over the steps in question; that she knew the steps were there; that she knew it was so dark she could not see the steps and as bearing on that question you may also consider whether or not the plaintiff took hold of the door jamb, or asked for lights, *or took any other reasonable precautions and care for her own safety.*” Held error, under above rule.

TRIAL: Instructions—Undue Emphasis on Evidence—Biased Recital

2 of Facts. It is reversible error for the court in its instructions to unduly emphasize the facts and circumstances which tend to disparage plaintiff's theory, while at the same time giving undue prominence to the facts and circumstances which tend to exculpate defendant. The practice of reciting evidentiary facts is condemned, generally.

NEGLIGENCE: Care of Premises—Duty to Non-trespasser—Common

3 Carrier. One who, expressly or impliedly, invites people to come upon his premises must keep them in a reasonably safe condition, irrespective of his own convenience. So held where a former passenger, with the consent of the railway company, was waiting at a depot for a conveyance, and was injured by reason of a defect in the building.

Appeal from Bremer District Court.—HON. C. H. KELLEY,
Judge.

TUESDAY, SEPTEMBER 21, 1915.

ACTION for personal injury. Opinion states the facts.—
Reversed.

Sager & Sweet, for appellant.

Hagemann & Farwell and *Carr, Carr & Evans*, for
appellee.

GAYNOR, J.—This is an action to recover for personal injuries which the plaintiff claims she sustained in attempting to pass from defendant's waiting room on the evening of September 18, 1910. It appears that the plaintiff was a passenger on defendant's railway from Waverly to the town of Tripoli, Bremer county, Iowa; that she arrived at the town of Tripoli in the evening; went immediately from the train to the station house for the purpose of awaiting the coming of her husband. After waiting a short time at the station house, in the waiting room, it became dark. No lights were in the waiting room, or about the station house, except one in the ticket office, where the station agent was at work. When she went to the station house to wait for her husband, she asked the ticket agent, in charge of the station, whether any of her people had been in town that day, and he said they had, but had gone home. She asked him then if she might wait there in the station house and he said "Yes. I am going to supper and will be back in a little while. You can stay here." After she had remained in the station house a short time, she went to the hotel to get her grip, which someone had carried there. She returned, however, with her grip to the depot. When the agent returned from supper, she asked him if she could use the telephone to call her husband. The agent told her she had better go to the hotel and telephone from there; so she started to leave the waiting room for that purpose, leaving her

grip behind. In passing out of the door, she fell, and received the injuries of which she complains.

She testified that she went to the hotel for her grip before the agent went to supper, but after she had asked him if she might remain in the depot. She also testified that it was light when she got back from the hotel; that in going to the hotel, she departed and returned through the same door out of which she fell. She also testified that it was dark when she asked the agent if she might use his telephone to communicate with her husband. She further testified: "When I started to the hotel to telephone, and at the time I fell, it was so dark you couldn't see the steps or anything. Couldn't see the platform or rails"; that she was not positive whether the door was closed and she opened it, but thinks it was open. She noticed that it was dark outside, and that she couldn't see the steps. As to her fall, her testimony is: "After starting to go to the hotel, I stepped out the door to step down and the next thing I knew, I laid upon the platform." She says she noticed it was so dark that she couldn't see, at the time she attempted to leave the waiting room and fell. There were three steps leading to the waiting room. She said she had the steps in mind when she started out to telephone; that she looked to see where they were, but it was so dark that she couldn't see. She further testified: "I don't think I had hold of the doorway on either side as I went to step out."

The train on which the plaintiff arrived reached Tripoli about 6 o'clock in the evening. There was no other train scheduled to leave Tripoli on that day after 6 o'clock. The next train was scheduled for 7 o'clock the next morning. No train stopped at or carried passengers from Tripoli between these hours.

The cause was tried to a jury and a verdict rendered for the defendant. Judgment being entered upon the verdict, plaintiff appeals.

In view of the fact that this case must be reversed, we have not attempted to set out all the evidence, or even a sub-

stantial portion of the evidence that went to make up the case.

1. TRIAL : Instruc-
tions : invading
province of
jury : negli-
gence.

Nor do we assume to pass upon the sufficiency of the evidence to make a case for or against the plaintiff. The plaintiff in her appeal complains of the action of the court in the submission of the cause to the jury. We will not attempt to set out the errors complained of in the language of appellant, nor in the order in which they are presented in appellant's brief. Suffice it to say that the plaintiff complains of the instructions of the court to the jury as a whole. Although appellant has divided her complaint of these instructions into several parts, the objection urged, when concretely stated, is that the court unduly emphasized what the court conceived to be the duties which the plaintiff owed to herself for her own protection; unduly emphasized the things omitted by her which she might have done, with the suggestion added that the omitted things, if done, would have prevented the accident of which she complains. There is no claim that the court did not correctly state the law of the case, but in the manner of stating it, the court made prominent and gave undue emphasis to those facts from which an inference of negligence on the part of the plaintiff might be drawn, and omitted any suggestion as to facts quite as well established and as closely related to plaintiff's conduct at the time as were the facts set out or referred to and emphasized in the instructions, from which an inference of due care might be drawn.

Thus it is claimed that the court in its instructions made a point to the jury of the fact that the plaintiff failed to ask for lights, while no word was spoken to the jury of the duty of the defendant to furnish lights. The attention of the jury was especially directed to the fact that the night was dark, very dark; that the plaintiff knew it was dark, and knew that she could not see the steps when she attempted to pass out the door. The suggested inference is that she was negligent in attempting to pass out the door without asking for

lights, under the conditions that attended her act. The jury's attention was especially directed to the fact that she had previously passed over these steps and through this door when it was light and she could see; that when she attempted to pass out the door at the time she fell, she failed to take hold of the door jamb.

As will be seen hereafter, the inference suggested by the instructions, as given, in the manner in which they were given, was that reasonable care required plaintiff to ask for lights before attempting to leave the room; that a failure to take hold of the door jamb in attempting to pass out of the room was an act of carelessness. It is claimed, in fact, that the court in its instructions called the jury's attention especially to all the points of weakness, if any weakness there was, in the plaintiff's evidence touching her contributory negligence; while it passed over, in general terms, the negligence of the defendant, saying simply, when speaking of defendant's duties and the negligence charged against the defendant:

"The burden of proof is on the plaintiff to show that the defendant was negligent in respect to the matters charged, or some of them; that negligence is the omission to do something which a reasonably prudent person, guided by these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonably prudent person would not do, under similar or like circumstances."

We are inclined to think that there is some justice in the criticism urged against these instructions, though not to the extent urged. It has been repeatedly held by this court that it is the duty of the trial court, in its instructions to the jury, to submit to the jury, fully and fairly and impartially, the law essential to a proper determination of the rights of the parties under the record made. The attention of the jury should not be drawn to nonessential facts,—facts not determinative of the rights of the parties. The court should

not emphasize or give undue prominence to evidentiary facts, the existence or nonexistence of which must be settled by the jury. See *Campbell v. Wheeler*, 69 Iowa 588; *Doyle v. Bruns*, 138 Iowa 439; *West v. Railway Co.*, 77 Iowa 654; *Van Norman v. Modern Brotherhood*, 143 Iowa 536; *McBride v. Railway Co.*, 134 Iowa 398:

The court, in its eighth instruction to the jury, said:

“Both the plaintiff and the defendant were required to exercise ordinary care under the circumstances. You should carefully note that the degree of care which the plaintiff was required to exercise is exactly the same as that required of the defendant, and if the plaintiff failed to perform her duty in this respect, which failure contributed to her fall, then she cannot recover in this action, even though you also find that the defendant also failed in its duty. In determining whether or not the plaintiff exercised such reasonable and ordinary care, it is proper for you to consider the number of times the plaintiff passed over the steps in question; that she knew the steps were there; that she knew it was so dark that she could not see the steps, and, as bearing upon this question, you may also consider whether or not the plaintiff took hold of the door jamb, or asked for lights, *or took any other reasonable precautions* and care for her own safety.”

A casual reading of this instruction suggests the thought that it was the opinion of the court, and the jury were given to so understand, that if they found that the plaintiff had passed over these steps before, that she knew they were there, that it was so dark she could not see, that she did not ask for lights before attempting to pass out, that she did not take hold of the door jamb in attempting to pass out, she did not act as a reasonably prudent person would act under the circumstances; for, in the closing of the instruction, the court says, after reciting these facts, “*or take any other reasonable precautions and care for her own safety,*” inferentially saying to the jury that the matters referred to in the instruction

tended to show that she did not take reasonable precaution and care for her own safety. This, we think, was invading the province of the jury, not perhaps directly, but inferentially, and therefore was error.

In the ninth instruction, the court said to the jury:

2. TRIAL: instructions: undue emphasis on evidence: biased recital of facts.

“During the time that the relationship of passenger and carrier of passengers exists, the law requires of the carrier a high degree of care for the safety of the passenger. As between the plaintiff and the defendant, however, such relationship had ceased prior to the time she fell, and the only duty which the defendant then owed to her was that of reasonable and ordinary care. The mere fact that the defendant is a railroad company does not in any way increase its duty to the plaintiff, and in considering this case, you should be governed by the same rules that would apply between two individuals. In determining whether or not defendant was negligent in any or all of the respects claimed by plaintiff, as set out in paragraph one hereof, it is proper for you to consider the manner in which, with the knowledge and consent of defendant, the said station was used by the public, after the departure of trains, at and prior to the time plaintiff fell; the length of time which had elapsed since the train had departed at the time in question; the fact that, at the time, no trains were being operated over said road during the nighttime; the fact that the personal business of the defendant did not require lights in the vicinity of said steps, and all of the other facts and circumstances disclosed by the evidence.”

It will be noted that in this instruction the court rather emphasized those facts which, in the mind of the jury, would tend to exonerate the defendant from all blame. Nowhere in the instructions does the court call the attention of the jury to the fact that the plaintiff was there with the knowledge and consent of the defendant company. Nowhere does it call at-

tention to the fact, which the evidence disclosed, that there were no lights in the room occupied by the plaintiff, or any duty on the part of the defendant to furnish lights.

Taking these two instructions together, the jury might well have inferred that the plaintiff was negligent if she did not call for lights; that no duty rested on the defendant to furnish lights; although the jury might, independent of this instruction, have found that reasonable care for the safety of the plaintiff required the furnishing of lights. The calling of the jury's attention to the fact that the plaintiff did not call for lights, without referring to the fact that the defendant company had not furnished any lights, might have led to the conclusion on the part of the jury that it was the opinion of the court that the defendant owed the plaintiff no duty to furnish lights unless called for by her, even though reasonable care on the part of the defendant might have suggested to the jury the necessity of furnishing lights, independent of her request.

This was a public waiting room, kept by the defendant for the use of the public in its dealings with the public. The plaintiff was there with the consent of the defendant. She was there awaiting the arrival of her husband. It is not unreasonable to suppose that the defendant knew that she would be required later to leave this waiting room through this door. There was no light there to guide her to or through the door. The door was at least two feet above the platform. The top step was under the threshold, narrowing the step to about seven inches. These matters were not recited by the court in its instructions to the jury.

While we deprecate the recital in instructions of facts and circumstances which have probative force upon the issues tendered, because they tend to give undue prominence to the facts recited, we are clearly of the opinion that, if the court undertakes to recite the facts disclosed by the evidence which have probative force upon the issues tendered, it must recite all the facts favorable to the party as well as those which militate

against his claim. We most emphatically dissent from the practice of reciting facts which militate against one party, without a recitation of the facts favorable to his contention, and reciting facts which are favorable to the other party's contention, without a recitation of facts disclosed by the evidence which militate against his contention, and we think that is the condition that confronts us here. In *Van Norman v. Modern Brotherhood*, 143 Iowa 536, 551, this court, speaking through Judge Weaver, said:

“The practice of embodying in an instruction a recitation of facts on which a party relies is not to be encouraged, because of the tendency to thereby unduly magnify the importance of the matters thus selected for specific mention.”

It will be noted that, in the last instruction referred to, the court told the jury that, in determining whether or not the defendant was negligent, they should consider the fact that the personal business of the defendant did not require lights in the vicinity of the steps; that no trains were being operated over its road during the nighttime. It is apparent that it makes no difference whether the defendant's personal convenience required lights or not, if it owed a duty to furnish lights to those using the depot by its permission. It will be borne in mind that the plaintiff arrived at this station on defendant's train; that she immediately entered defendant's waiting room; that she was there and remained there with the knowledge and consent of the defendant company, pending the arrival of her husband to transport her to her home. The company then owed a duty to the plaintiff to keep the premises in a reasonably safe condition for her use during the time she remained there under those circumstances, and if reasonable care required the use of lights to that end, it was the duty of the company to furnish the lights, even though not requested by her. This court, speaking through Judge

3. NEGLIGENCE:
care of prem-
ises: duty to
non-trespasser:
common car-
rier.

Deemer, in *Upp v. Darner*, 150 Iowa, quotation from page 407, stated the rule thus:

“One is under no duty to keep his premises in a safe condition for the visits of trespassers. But, if he expressly or by implication invites others to come upon his premises, it is his duty to be reasonably sure that he is not inviting them into a place of danger, and to this end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.”

In this ninth instruction, the court told the jury that when they came to consider whether or not the defendant was negligent, it was proper for them to consider the length of time that had elapsed since the train had departed; the fact that no trains were being operated over the road during the night; the fact that the personal business of the defendant did not require lights; but nowhere told them that, notwithstanding the fact that no trains were operated during the night, and notwithstanding the fact that the personal business of the defendant did not require lights in the vicinity of the steps, yet, if reasonable care for the safety of those who were in or using the waiting room, with the permission of the company, required lights in the vicinity of these steps, the company could not escape liability on the mere ground that it was not operating trains at that time and did not require lights for the transaction of its personal business.

When the plaintiff left the defendant's train and entered defendant's waiting room, and with the permission of the company remained there, awaiting transportation to her home, the company owed her some duty—a duty at least to exercise reasonable care to see that the waiting room was in a condition that rendered it reasonably safe, not only for her while remaining there, but in a condition reasonably safe for her to pass from the depot when the time arrived for her departure.

It may be admitted that she was not a passenger, but

she surely was not a trespasser. She was there for a legitimate purpose, growing out of her previous relationship with the company. She was there at least with the knowledge and consent of the company, and out of this relationship grew a duty to her personally, and a failure to exercise reasonable care in the discharge of this duty constituted actionable negligence. Nowhere did the court put the thought to the jury specifically that the company owed the plaintiff any duty.

We think that, for the errors pointed out, the cause ought to be and it is—*Reversed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

FRED ZINKULA et al., Appellants, v. KATHERINE ZINKULA et al., Appellees.

WILLS: Undue Influence—Testator's State of Mind—Declarations.

- 1 Under a charge that a will was the result of undue influence, the declarations of the testator made to a disinherited heir prior to the making of the will are admissible as bearing on his (testator's) state of mind.

PRINCIPLE APPLIED: A letter written by testator to a daughter was held admissible, wherein testator referred to his wife (who was charged with having exercised the undue influence) as "that wicked mamma of ours."

WILLS: Undue Influence—Declarations of One Employing Undue

- 2 **Influence—Evidence.** Declarations hostile to a disinherited heir, made either before or after the execution of a will, by one charged with having employed undue influence on testator, are admissible to show the state of mind of the declarant.

PRINCIPLE APPLIED: Declarations of testator's wife (a) that the daughters of testator did not deserve any of the property, (b) that the daughters should not get any of the property, and (c) that she, the mother, would not allow testator to give the daughters anything, were held admissible.

APPEAL AND ERROR: Excluded Evidence Otherwise Admitted.

- 3 It is futile to attempt to predicate error on the exclusion of evidence otherwise received.

APPEAL AND ERROR: Excluding Questions After Witness Has
4 **Exhausted His Knowledge—Evidence.** It is futile to attempt to predicate error on the exclusion of questions after the witness has shown by his answers that he has no further knowledge on the subject.

WILLS: . Inequality of Distribution—Effect. Inequality of distribution will not, of itself, defeat a will—is not, of itself, any evidence of undue influence.

WILLS: Undue Influence—Declarations of Testator Not Substantive
6 **Evidence.** He who would overturn a will on the ground of undue influence must not rest on the declarations of the testator alone.

WILLS: Inequality of Distribution—Effect.
5, 7.

WILLS: Undue Influence—Opportunity to Employ—Effect. Disposition or state of mind to employ undue influence, plus an *opportunity* to employ such influence on testator is not of itself sufficient to prove the ultimate fact of undue influence.

WILLS: Mental Incompetency—Delusions—Will Must Be Offspring
9 **of.** Merely showing that testator was possessed of a delusion raises no question for a jury. It must fairly appear that the will was the offspring of the delusion.

PRINCIPLE APPLIED: If testator was possessed of a delusion, it was that his wife was sullen, morose, and lacking in affection for both him and the daughters, and especially that the wife was bitterly hostile to the daughters and opposed to testator's giving any of his property to them. *But he had no sympathy with such believed attitude of the wife*, and he and the daughters were, up to the time of his death, on friendly and affectionate terms. His will discriminated against the daughters. *Held*, such delusion furnished no support for overturning the will.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

TUESDAY, SEPTEMBER 21, 1915.

ACTION to set aside the probate of a will. Trial to a jury. At the conclusion of plaintiffs' testimony, a verdict was directed for defendants. Plaintiffs appeal.—*Affirmed.*

Wade, Dutcher & Davis, for appellants.

Ney & Bradley, for appellees.

GAYNOR, J.—On the 7th day of March, 1912, Frederick Zinkula executed the following will:

“First. I direct that all my lawful debts and claims including funeral expense, expenses of last sickness and the expenses of administration be first paid out of my estate.

“Second. I give, devise and bequeath to my son, Joseph Zinkula, the following described real estate situated in Johnson county, Iowa, to wit: The N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of Sec. 29, Twp. 78 N., R. 5 W. of the 5th P. M., containing 100 acres, on condition that my said son, Joseph Zinkula, pay to my wife, Katherine Zinkula, the sum of \$120.00, annually, each and every year, during her life.

“Third. I give, devise and bequeath to my beloved wife, Katherine Zinkula, during her life the following described real estate in Johnson county, Iowa, to wit: The N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 31 and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 32; also the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 29, all in Twp. 78 N., of R. 5 W. of the 5th P. M., containing 100 acres, to be by her used during her life, and after her death the same land described in item third of this will to be and become the property of my son, George Zinkula, absolutely.

“Fourth. I direct and it is my will that the following described forty acres, to wit: The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 29, Twp. 78 N., R. 5 W. of the 5th P. M., be sold by my executor hereinafter named for the best price obtainable, and the proceeds thereof be equally divided among my six daughters, to wit: Magdalena Simpson, Katherine Schintler, Anna West, Barbara Anderlik, Mary Hotz, Rose Zinkula, share and share alike.

“Fifth. I give, devise and bequeath to my son, Frank Zinkula, the following described real estate situated in Johnson county, Iowa, to wit: The N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of Section 9, Twp. 78 N., R. 5 W. of the 5th P. M. on condition

that my said son, Frank Zinkula, pay to my wife Katherine Zinkula, the sum of \$120.00 annually, each and every year during her life.

“Sixth. To my son, Frederick Zinkula, who left me when I needed him most on the farm, I hereby give and bequeath the sum of \$5.00, and no more, out of my estate.

“Seventh. I give, devise and bequeath to my daughter, Rose Zinkula, the following described real property situated in Iowa City, Iowa, to wit: The E. $\frac{1}{2}$ of Lot Six and the W. $\frac{1}{2}$ of Lot Seven in Block 16, Iowa City, Iowa, except 25 feet off of the east side of said W. $\frac{1}{2}$ of Lot Seven in said Block 16, subject, however to a life estate therein of my wife, Katherine Zinkula, who is to use and occupy the same during her life.

“Eighth. I give, devise and bequeath to my beloved wife, Katherine Zinkula, all the rest and remainder of my estate, she to have all the moneys and evidences of money, in lieu of dower in addition to the provisions otherwise herein made for her, she to have the remainder herein mentioned and the use thereof for and during her life, same to be used and disposed of according to her pleasure, and if any of said personal property remain undisposed of by my said wife at the time of her death, I give, devise and bequeath all such residue and remainder to my six daughters mentioned in item four herein, same to be divided among them in equal shares, share and share alike.

“Ninth. I hereby nominate and appoint John Tellin, of Iowa City, Iowa, executor of this my last will and testament, and direct that he be not required to give any bond as such executor.”

The testator died on the ninth day of May, 1913, and this will was duly admitted to probate thereafter. At the time of his death, he was 73 years old. His wife was 64 years old. He left surviving him his wife, five sons and six daughters, and two grandsons, the offspring of a deceased daughter.

This action is brought to set aside the order of probate on the alleged grounds: (1) That the said Frederick Zinkula, at the time of the execution of the will, was of unsound mind, and did not possess testamentary capacity; (2) that the execution thereof was procured by undue influence exerted upon him by the defendants, and the same was not his free and voluntary act and deed, and therefore does not constitute and is not his last will and testament.

The defendants appeared and denied the allegations upon which plaintiffs base their right to have the will set aside. The cause was tried to a jury. At the conclusion of contestants' testimony, the court, on the motion of proponents, directed a verdict against the contestants. Hereafter, for convenience, we shall refer to the contestants as plaintiffs and proponents as defendants.

Plaintiffs appeal and urge two grounds for reversal:

First. That the court erred in its ruling upon the admission of testimony in certain particulars, to which attention will be hereinafter called.

Second. The court erred in sustaining a motion to direct a verdict for the defendants under the record as made.

I. We will take up the grounds for reversal in the order assigned: Did the court err in the rejection of testimony as charged by the plaintiffs? To intelligently consider these complaints, it will be necessary to review somewhat the condition of the record at the time this evidence was rejected by the court. It may be well, however, to have the matter complained of in mind while the record is being reviewed.

The first error relied upon is that the court erred in rejecting a certain letter offered in evidence, written by the testator to his daughter, Magdalena, dated March 18, 1909. This letter is shown to be in the handwriting of the testator, and received by the daughter in due course of mail, and reads as follows:

1. WILLS: undue
influence:
testator's state
of mind:
declarations.

“Well, I thought to write you a few lines, to let you know how we are getting along. We are all well with that bad weather. Every day we have different weather. One day it is nice, next day it rains, and the third day it is frosty, so it is queer weather this year.

“I was at our children on the farm last week. I was there three days, I visited them all there, and they are all well. I must also let you know that our Annie is going to the farm, they are going to move next Monday. They sold their house and rented a farm about 3 miles west of town, so they are going to farm. I don’t know how they will get along, everything that they must buy is so dear, and they have to buy everything, so I wonder how they will get along.

“David Simpson was here last week. I was coming from town and met him on the street. I came near not recognizing him, he stopped and offered me his hand, and I could not recognize him, he looks sort of sickly. So I told him to go with me to dinner, but he did not want to go with me; he was afraid of that wicked mamma of ours. He went with the other man to Schintler’s and I went there too, then I don’t know when they went home, I didn’t see them any more.

“So when you write, let me know when Rosie wrote you, and if you are all well, write also if you have that cistern finished, if not, then have it made, and I will pay for it what it will cost.”

The second error assigned is predicated on the ruling of the court in rejecting the testimony of Katherine Schintler, a daughter of the testator. She was asked by plaintiffs’ counsel this question: “Q. Did you have any talk with your mother as to what your father had to do about his property?”—the plaintiffs stating at the time that this offer was to show feeling between the mother and the girls who are con-

2. WILLS: undue influence: declarations of one employing undue influence: evidence.

testants. Objection was interposed to the question and sustained.

The third error in the admission of testimony is predicated upon the action of the court in sustaining an objection to the following question propounded to Mary Hotz, daughter of the testator, while testifying for the plaintiffs: "Q. Were there any times when you heard your mother say what your father should do with his property in reference to the girls; whether they should get it or should not get it?" This is asked for the purpose of showing the feeling that existed between the mother and the girls.

The fourth error assigned on this point is that the court erred in striking out the testimony given by Michael Zinkula, a son of the testator, in which he said: "I heard mother speak about her feeling towards the girls. She told me one time she did not want father to give any more property to the girls. I asked her why. She said she wouldn't let him."

It appears that this testimony as to what was said by the mother related to a time after the execution of the will, and was stricken out for that reason. These are all the errors assigned upon the first ground for reversal.

As to the first error complained of, involving the action of the court in rejecting a letter written by the testator to his daughter, Magdalina, the 18th day of March, 1909, we have to say that, in view of the theory upon which this case was tried, we think this letter might well have been admitted by the court. Plaintiffs seek to maintain two positions: (1) That the father was very friendly towards the daughters; wished them well, and had a kindly interest in their welfare; (2) that the mother was hostile to the daughters and had no kindly interest in their financial condition,—that she did not wish the girls to have any of the father's property. But, we cannot reverse the case upon this ground; for, although this letter has some bearing upon the issue made, it touches so slightly upon the point contended for that its exclusion cannot be deemed prejudicial in view of the fact that the court allowed

to go into the record thirteen other letters written by the testator to this same daughter, covering a period from 1893 up to and including the period covered by this letter, in which stronger language was used of and concerning the mother than was used in this letter.

As to the second error assigned, we think, too, that the court erred at the time in not permitting an answer.

It appears, however, from the record that, subsequently, when another daughter, Anna West, was being examined by the plaintiffs, this same question was propounded, and thereupon the plaintiffs made the following offer:

3. **APPEAL AND
ERROR:** excluded
evidence
otherwise
admitted.

“Plaintiffs offer to prove by this witness that her mother told her before this will was made that she was afraid that Mr. Zinkula would give the home residence to Rosy and said if he ever did, she would pull every hair out of her head and that she wanted him to sell the place and go and buy a small place because she did not want her to get that place, and this evidence is offered for the purpose of showing the feeling that the mother, whom we charge with exercising undue influence, had toward this daughter Rosy. Plaintiffs also want to show by this witness that at different times her mother said, told her, said in her presence, that the girls should not get anything, that the boys should get the property, for the same purpose to show the feeling she had towards the plaintiffs.”

By Counsel: “I also want to recall Mrs. Schintler on the same subject and offer to prove by her that her mother said father wanted to give Rosy the house and wanted to know what Mrs. Schintler thought about it, and Mrs. Schintler said let him do as he wanted to and her mother said she would see to it she wouldn’t get it, that the boys would get the farms and the girls need not look for anything, they wouldn’t get anything.”

Thereupon Mrs. West gave the following testimony:

“Mother used to tell me that if father would will the house to Rosy she said she would pull her hair out of her head. She wanted the house for George and she always told me she says us girls wasn’t going to get anything, it was all for the boys. I asked her why. She said, you didn’t work. She says, you don’t deserve it. She used to tell me she wanted father to sell the house. I asked her why. She says, I am afraid he is going to give it to Rosy. She wants him to take a smaller place for some reason. I don’t know why. She always said she wanted him to sell the place, she wanted to buy a small house. She wouldn’t do it because he always had it ready for Rose.”

At the conclusion of Mrs. West’s testimony, the plaintiffs recalled Mrs. Schintler, and she was permitted to testify and did testify substantially as suggested by counsel at the time he expressed his desire to recall her, as hereinbefore set out, covering the same subject-matter called for by the question to which objection was sustained, and of which complaint was made. The ruling excluding this testimony originally was without prejudice to the plaintiff.

The third error relied upon relates to the refusal of the court to permit the witness Mary Hotz to answer a certain question as to what she heard her mother say her father should do with his property in reference to the girls. No error can be predicated upon the action of the court in refusing an answer to this question, because the witness had already testified as follows:

4. **APPEAL AND ERROR:** excluding questions after witness has exhausted his knowledge: evidence.

“I heard mother talk to father only one time in regard to what should be done with the property. We come to the city, I and my husband, and mamma was complaining about the girls not coming home to visit her and papa says, mamma gave everything to the boys and they don’t come to see her either, and mamma says that the girls didn’t work, they didn’t deserve it, that is why they didn’t get it or wouldn’t. She thought the boys would get it. The reason she gave father for

that was that the girls didn't use to work as hard as the boys."

This testimony went in without objection. Thereupon, counsel propounded the question to which objection was urged and sustained, and of which complaint is made. There is nothing in the record to indicate that, if she had been permitted to answer this question, the answer would have been other or different than was detailed by her in her previous testimony, hereinbefore set out. There is nothing to show that she ever had any other conversation with her mother, except the one which she detailed. We cannot speculate on the record for the purpose of finding error. The question assumes that there were other times when she heard her mother say something about the property, but there is no evidence that she did, in fact, hear her mother speak concerning the property, except as hereinbefore detailed. There is no prejudicial error apparent on this point, and none can be presumed from this state of the record.

We come now to the fourth error assigned, the striking out of the testimony of Michael Zinkula, which is as follows:

"She (meaning the mother) told me one time, she says to me, she didn't want father to give any more property to the girls. I asked her why, she said because she wouldn't let him do that."

Counsel for the plaintiff, referring to the ruling on the question submitted to Michael Zinkula above, thereupon proposed to the court to show by the witness that his mother told him many times that she didn't want her husband to will the girls a cent, and that he went and left them forty acres of land anyway, but he didn't dare to give them a cent if he was living, counsel stating, at the time, that the evidence was offered for the purpose of showing the extent of the feeling that the mother had against the girls. The court thereupon

said, "This was after his death?" to which counsel responded, "Yes," and the offered testimony was not received.

In considering the relevancy of this testimony, its probative force and importance in the disposition of the controversy, we must bear in mind that it was the claim and contention of the plaintiffs, all the way through, that the mother was hostile to these girls; that she didn't want her husband to leave them any of his property; that she was a dominating, domineering woman; that the husband was afraid of her, and afraid to oppose her wishes in this respect. It is contended that this dislike for the daughters and this purpose to prevent the father from bequeathing them anything continued up to the time of her husband's death; that this indicated a motive on her part to exercise the undue influence charged. It is claimed that the will is the result of the undue influence exercised by this mother over the testator during his lifetime, and it is claimed that it is always competent to show the condition of the mind and the malice, if any, of the party charged with the exercise of undue influence. Of course, this does not necessarily show the exercise of undue influence, but it is a fact to be considered with other evidence in determining whether undue influence was used or not. The fact, however, that the person charged with exercising undue influence had a hostile mind towards those excluded from the testator's bounty, and desired that they should be excluded, even though such state of mind and desire were communicated to the testator, does not, in and of itself, show the exercise of undue influence in the doing of the thing charged to have been the result of such exercise.

In discussing this question, counsel for the plaintiffs rely somewhat upon what is said by this court in the eighth paragraph of the opinion in *Betts v. Betts*, 113 Iowa 111, 118. We do not think, however, that the discussion there is sufficiently broad and comprehensive to throw much light upon the question now under consideration. We are inclined to think that this evidence was competent and material. Whether its exclu-

sion is ground for reversal, under the record, presents a different question. The fact that an error is committed by the court in receiving or rejecting evidence does not always call for a reversal. If, with this evidence before the court, the result must have been the same, it would be idle to reverse on account of its exclusion. We will speak of this later.

This brings us to a consideration of the real controversy in this case, the second ground upon which reversal is sought.

II. The contention of the plaintiffs is that the court erred in directing a verdict for two reasons: (1) That it was clearly shown that the testator was of unsound mind; that he was possessed of an insane delusion with reference to the disposition of his property, and the attitude of his wife with reference to such disposition. (2) That it was clearly proven that the testator was under the complete domination of his wife, who was determined in her attitude of ill feeling towards her daughters, and determined in her position that they never should receive any of the property.

It goes without saying that it is not necessary that the record establish clearly and without question the propositions upon which plaintiffs seek to have the probate of this will set aside. It is sufficient if the evidence is such that minds honestly searching for the truth as to the question in controversy might differ in their conclusion as to what the ultimate fact is. The general rule so often pronounced by this court is, where there is evidence in the record tending to support a proposition, and reasonable minds might differ as to whether the evidence does or does not support the proposition, then it is a question for the jury; that is, the question must be left to the jury for its determination, whenever the evidence is of such a character that reasonable minds might differ as to the conclusion to be reached, from the evidence, as to what ultimate fact is established. The trier of the fact is entitled to draw all legitimate inferences from the facts proven. Many ultimate facts are established by inference alone. Many facts of which we take cognizance are deductions or inferences from

known or proven facts. A third fact may be born of and have its being, with a recognized entity in the world of thought, from other facts, which common experience shows have creative force in its production.

To entitle plaintiffs to recover in this suit, they must establish by a preponderance of the evidence that the instrument in question does not express the mind of the testator. To this end, one of two facts must affirmatively appear: either that the testator, at the time of the making of the will, was mentally incompetent to make a will, or that his mind was so unduly influenced by his wife in the making of it that it did not express his will and purpose, but rather the will and purpose of his wife. There is absolutely no evidence in this record even hinting at a possibility that any undue influence was exercised by anyone other than the wife, the mother of these girls.

We start with the fundamental proposition that every man has a right to dispose of his property as he sees fit. His children have no legal claim upon his bounty. He alone has the right to estimate the comparative deserts of his children and their claims, if any, upon his bounty. The law provides, in the absence of any will, that the children shall share equally in the distribution of the estate. This places, however, no handicap upon the will of the testator in the disposition of his property. The fact that the will is inequitable, because to some children, who apparently are just as deserving as others, he gives less than a just proportion of the estate, is a fact to be considered in determining whether or not the will expresses the intent of the testator. This is due to a recognized fact that parents do not usually unjustly discriminate between their children, when in possession of all their faculties, and when not unduly influenced. However this may be, inequality of distribution will not defeat the purpose of the will. Indeed, if it did, very few wills would be permitted to stand. If the testator desired a just and equitable distribution of his property pro rata among

5, 7. WILLS:
inequality of
distribution:
effect.

his children, there would be no occasion for making a will. The law would do that for him. It is only when the testator desires that his property should go other than is directed by the law,—that some of his children should receive less and some should receive more of his estate,—that a will is resorted to.

In the case before us, it would seem as if these daughters should have had more consideration at the hands of the father in the disposition of his property, but it does not justify us in thwarting his purpose as expressed in his will. There is no substantive evidence in this case that the testator, at the time of the making of the will, was not in full possession of all his faculties. There is no evidence that he did not understand and comprehend the import of his will and the disposition he was making of his property. There is no evidence that he did not understand and comprehend the extent of his property and who were the natural subjects of his bounty. There is no evidence that he did not have a mind capable of exercising judgment and deliberation, and capable of weighing the consequences of his will to a reasonable degree, and the effect of it upon his estate and his family. There is no evidence that he was either physically or intellectually weak. There is no evidence of any overt act on the part of his wife, tending in any way to influence him in the disposition of his property. There is no substantive evidence of anything said or done by her even tending to show that she sought in any way to influence him in the disposition of his property by will or otherwise. There is no substantive testimony that he and his wife did not live together fairly amicably, and that they did not entertain for each other the kindly feeling which usually exists between husband and wife. It is true that, in the letters which he wrote to his daughters, he complained of his wife's treatment. It is true he spoke of her as being hostile to the daughters. It is true that he wrote to his daughters as late as January, 1912:

6. WILLS: undue influence: declarations of testator not substantive evidence.

“Mamma continues to be peevish and morose most of the time. She doesn’t speak and continues to be angry. I don’t know what is the matter with her. When she speaks to me, it is always in anger. That seems to be her way. I believe she thinks I am sending to you some money, or to Magdaline. She doesn’t want to give anything to the girls, but when George spent several hundred dollars last spring, she said nothing.”

It is true that he wrote several letters to his daughters of the same import. However, every substantial fact stated by him in his letters to his daughters touching the attitude of the wife towards him, her disposition and character, her attitude towards her daughters, and her disposition towards giving property to them, was denied by the wife. There is no substantive evidence that any fact detailed in these letters, concerning the wife and her disposition towards the daughters, was true. The wife testified, “I never said to him that I didn’t want him to give anything to the girls.” The wife positively testified, and there is no substantive evidence to dispute her, that she was always on good terms with her daughters; had nothing against them. In fact, she denies every matter written by the husband to these daughters, touching her attitude towards her husband and towards her daughters.

While it is true that these letters written by the testator to his daughters were competent evidence as throwing light upon the condition of his mind, yet it is not substantive evidence, and cannot be considered as tending to show that undue influence was in fact exerted upon him in the making of the will. See *In re Townsend Estate*, 128 Iowa 621, in which the following excerpt from Schouler on Wills is quoted with approval:

“A testator’s declarations, whether made before or after the execution of the will, . . . are admissible chiefly to show his mental condition or the real state of his affections; and they are received rather as his own external manifesta-

tions than as evidence of the truth or untruth of the facts relative to the exertion of undue influence upon him. They may corroborate, but the issue calls for its own proof from the living. . . . There, on the whole, should be independent testimony indicating undue influence before the decedent's declarations are considered, and then they are chiefly pertinent to show the condition of the mind susceptible to the sinister influence and a testamentary act correspondingly."

It is, however, stated in that case that mere declarations are of very little force, and amount to very little in themselves, in the face of a prima-facie showing that the testator was a thoroughly competent person, enjoying normal health, and under no apparent coercion or stress when he executed the instrument. See, also, *Johnson v. Johnson*, 134 Iowa 33, in which it is said :

"Undoubtedly the statement of the deceased (and these letters are nothing but statements of the deceased) may be received as indicating his state of affections or dislike for particular persons benefited or not benefited by the will, of his inclination to obey or resist persons alleged to have exerted the influence, and, in general, his mental or emotional condition, with reference to his being affected or influenced by any of the persons concerned. But as an account or recital of what, in fact, has occurred in the past, such evidence is no more than hearsay, and ought not to be received as tending to establish the facts related."

It is undoubtedly the law that, where there is evidence independent of the inequitable features of the will tending to show undue influence exerted upon the testator, or that the

5, 7. WILLS :
inequality of
distribution :
effect.

testator's mind was enfeebled by age or sickness, or was for any reason unsound, an unjust discrimination between those who have equally meritorious claims upon his bounty may be considered

for the purpose of corroboration, or for the purpose of showing that he was, in fact, in a mental condition to be influenced, leading to the probability that he was affected by such influence exerted upon him. But unquestionably, under all the authorities, there must be some evidence of undue influence, some evidence of mental incapacity, outside of the mere fact of inequitable distribution. The mere fact of apparent unjust discrimination in the will is not, in and of itself, substantive evidence that he was unduly influenced in the making of the will, or that he was wanting in testamentary capacity. See *Johnson v. Johnson*, *supra*; *In re Townsend Estate*, *supra*; *Vannest v. Murphy*, 135 Iowa 123; *Slaughter v. McManigal*, 138 Iowa 643.

Mere proof that someone who is beneficially affected by the will had an opportunity to influence the testator in his favor, or proof that one beneficially affected not only had an opportunity but a disposition to avail himself of opportunities presented, without proof of something done or attempted by him in the way of influencing the testator, would not be sufficient proof of undue influence exercised. Nor would proof of the fact that one who is shown to be hostile to those who did not get recognition in the will had an opportunity to exercise hostile influence on the mind of the testator be sufficient without further proof.

The most that can be contended for in this record, so far as undue influence is concerned, is that the mother of these girls who are complaining desired that they should not have any portion of the father's estate; that she had an opportunity of influencing the father to that end. There is no evidence that she ever said or did anything tending to effectuate that purpose, except, perhaps, the testimony of Mary Hotz, hereinbefore set out, in which she said she heard mother talk to father only one time in regard to what should be done with the property:

8. WILLS: undue
influence:
opportunity to
employ: effect.

"I and my husband came to the city and mamma was complaining about the girls not coming home to visit her, and papa says, mamma gave everything to the boys, and they don't come to see her either, and mamma says that the girls didn't work, they didn't deserve it, that is why they didn't get it or wouldn't get it. She thought the boys would get it. The reason she gave father for that was that the girls didn't use to work as hard as the boys."

It does not appear, however, when this conversation was had, or what led up to the conversation. It does not appear that the husband made any response, or even that he heard what was said by the wife. It appears that a discussion was had between the witness Mary Hotz, her father and mother. The mother was complaining about the girls not coming home, and the father remarked, "The boys don't come either, and yet you want them to have everything," and the mother responded that the girls didn't work and didn't deserve anything, and gave that as a reason why they shouldn't receive anything. It was a mere expression of the opinion of the wife that the girls were not entitled to receive as much as the boys because they didn't work as hard, presumed, for the father, as the boys did. This is the only time the record discloses that the father and mother talked on this matter, and the father entertained his opinion apparently without fear of offending his wife.

Under this record, there is no substantive evidence of any want of testamentary capacity on the part of the father—no evidence that he was physically or mentally weak. So far as this record discloses, he was a man of considerable business ability, entertained a proper regard for his relationship to his family; his love for the girls was uninfluenced by anything that the mother said or did. He visited them, invited them to his home, treating them with all the consideration and fondness of a parent for a child. There is no substantive evidence of any ill feeling or disturbance in the home life. This wife

and mother was called to the stand by the plaintiffs. She was examined touching her home life, and her relationship to her husband, and denied that she entertained a feeling of hostility towards her daughters; denied that she communicated any such feeling to her husband; and practically said there was no more trouble between her and her husband and in her family than is found in the ordinary home.

These contesting daughters were on the stand, and nowhere do they impeach the mother's character, or attempt to show any dominating influence by her over the life of her husband. Nor do any of them attempt to show that the husband was in the least under the control or domination of his wife. No act is shown in which he surrendered his will to hers, or where she ever coerced him into doing anything against his will or his judgment. There is no evidence that she was peevish or morose,—no evidence that the daily intercourse between herself and her husband was not such as usually and ordinarily exists between husband and wife. Of course, we speak now of evidence independent of what was written by him in the letters. This we do not accept as substantive evidence of these facts in this controversy.

But it is argued that, conceding that the mother loved her daughters, conceding that she did not entertain a hostile feeling towards them, conceding that she was a dutiful and affectionate wife in all her relationships with her husband, conceding that she was not morose and sullen, conceding that all that the letters contained touching the wife and her attitude towards these contestants and the husband is untrue, then it follows that the testator must have been laboring under some delusion touching these matters, and that this is evidence of insanity; that this is evidence of an insane delusion which rendered him incapable of making a will.

Not all insane delusions render one incapable of making a will. A man may possess all the mental qualities essential to the transaction of even intricate business, and yet have delu-

9. WILLS : mental incompetency : delusions : will must be off-spring of.

sions about other matters that do not affect or concern the act which he is required to perform. It is true that, in some instances, delusions have been held sufficient to justify a court in holding that they had controlling force and dominated the action of a testator in making a will. Where it is shown that the delusion is unfounded, and without it, in all probability, a different course of conduct would have been pursued, or where it is shown that the act of the testator was influenced by the delusion, and that, without such influence operating on his mind, he would have done other than he did, then his act is said to be the result of the delusion and not a deliberate act of a mind possessing testamentary capacity. Those are cases where it is shown that one has omitted from his will a child who in the ordinary course of nature, was dear to him and to whom his natural instincts would have directed the bestowal of his bounty, and it was made to appear that his mind had been falsely poisoned against the child. *Hardenburgh v. Hardenburgh*, 133 Iowa 1, 6, illustrates these holdings. See, also, *Friedersdorf v. Lacy*, 90 N. E. (Ind.) 766, 768; *Barbo v. Rider*, 67 Wis. 598, 602 (31 N. W. 155); *Boughton v. Knight*, 3 L. R. (P. & D.) 64, 75; *Snell v. Weldon*, 90 N. E. (Ill.) 1061; *Rivard v. Rivard*, 66 N. W. (Mich.) 681, 688.

The case at bar presents a very different question. Nothing was ever said or done, so far as this record discloses, to poison the mind of the testator against these daughters. Indeed, he seems to have had a great affection for them up to the time of his death. In no way did his belief in his wife's attitude affect his intercourse with them. He entertained no delusion as to his daughters—as to their character, as to their attitude towards him, or as to their right to be the recipients of his bounty. The most that can be claimed is that he had a delusion as to the attitude of his wife towards them, an attitude with which he appears to have had no sympathy. His social intercourse with them during all his life was pleasant. He invited them to his home. He visited at their homes. He seemed interested in their welfare, and in the will he made

more bountiful provision for them than for some of the sons who, so far as this record shows, were equally entitled to be recipients of his bounty as were the sons of his choice.

It would require a very strange and unnatural process of reasoning to reach the conclusion that the father was influenced by his belief in the attitude of the mother towards these daughters in the making of the will in question, and clearly so in the absence of any showing that she asserted or attempted to assert any control over him in the disposition of the property. We think the record wholly fails to establish either of the propositions upon which the plaintiffs rely.

As to the exclusion of the testimony of Michael Zinkula, heretofore referred to, we have to say that this testimony went only to the mental attitude of the wife. It never appears to have been communicated to the husband; and, as there was no substantive evidence tending to establish the fact of undue influence, the error in striking out this testimony was without prejudice, for the reason that, even with it in, the court must have directed a verdict for the defendants.

The case is therefore—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

HENRY ALLSHOUSE, Appellee, v. C. E. CARRAGHER, Appellant.

INTOXICATING LIQUORS: Nuisance—Presumption from Possession. The finding of intoxicating liquors in a drug store, the proprietor not having authority to sell the same, raises the presumption that they were possessed with the intent to sell the same in violation of law. (Sec. 2427, Code, 1897.)

Appeal from Floyd District Court.—HON. M. F. EDWARDS,
Judge.

FRIDAY, MARCH 19, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

SURT to enjoin an alleged liquor nuisance resulted in decree as prayed.—*Affirmed.*

J. C. Campbell, for appellant.

M. S. Odle, for appellee.

LADD, J.—The defendant operates a drug store at Rudd. Prior to February 9, 1913, he had a permit to sell spirituous liquors for medical and mechanical purposes. As objections were interposed, he abandoned his application for a renewal thereof. The evidence leaves no doubt that, while he had the permit, he sold intoxicating liquors in violation of law, and such was the reputation of his place of business. The maintenance of a liquor nuisance, then, was established by the evidence and the only remaining issue to be determined is whether it has been abated. The evidence is in conflict as to whether his store was still reputed to be a place where intoxicating liquors were sold, four witnesses, at least, saying it had that reputation up to the time of the hearing, and others that it has not been so reputed for a year or more; and two or three had never heard that such had been its reputation. At the time of trial, defendant had on hand 230 pints of whisky, 22 pints of brandy, and 24 pints of gin, and from this the presumption of keeping for illegal sale arose. Sec. 2427, Code. He explained, however, that he had retained the supply on hand at the expiration of his permit, without which he could not dispose of the same. Possibly he might have returned to the wholesaler from whom he purchased, or disposed thereof beyond state borders, or he might have been retaining with the hope of finally obtaining a permit. The controversy concerning the present reputation of defendant's place of business and the quantity and character of the supply on hand, when considered in connection with the undisputed fact that he had been maintaining a nuisance in violation of the trust reposed in him in granting a permit, raised grave doubts as to his

1. INTOXICATING
LIQUORS: nuisance: presumption from possession.

good faith and his repentance of wrong-doing, and we are not inclined to interfere with the court's conclusion that a decree should be entered restraining him from selling or keeping for sale, thereby removing all temptation to resume his former habits of defying the law, if perchance he ever ceased so doing. *Tuttle v. Bunting*, 147 Iowa 153; *Sharp v. Arnold*, 108 Iowa 203; *Drummond v. Drug Co.*, 133 Iowa 266.

The sum of \$25 will be taxed as part of the costs in favor of plaintiff's attorney and the decree is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

MRS. P. C. BLACK, Appellee, v. GRAIN SHIPPERS MUTUAL FIRE
INSURANCE ASSOCIATION, Appellant.

INSURANCE: Proofs of Loss—Sufficiency of Evidence. Evidence
1 that proof of loss under a fire insurance policy was made out, verified, and mailed to the company, along with evidence on behalf of the company that no proofs of loss were ever received, raises such a conflict in the evidence that the jury or court findings thereon will not be disturbed on appeal.

EVIDENCE: Secondary—Notice to Produce Original—When Not
2 **Necessary.** When the adverse party is the only one who could have the possession of original papers, and such party bases his defense on the claim that he never received such papers, notice to produce is not necessary. So held in case of proof of loss under policy of insurance.

INSURANCE: Warranties to Be Indorsed on Policy—Waiver. Evidence reviewed,
3 and held to justify a finding that an insurance company had waived the provision of a policy requiring the warranty of the carrying of other insurance *to be indorsed on the policy*.

INSURANCE: Premiums—Payment—Estoppel. Evidence reviewed
4 and held to justify a finding that premiums on a policy of insurance had been paid, or if not paid, that the company was estopped to so claim.

INSURANCE: Cancellation—Question of Fact. Evidence reviewed
5 and held to justify a finding that a policy of insurance had not been cancelled.

Appeal from Ida District Court.—HON. M. E. HUTCHISON,
Judge.

SATURDAY, APRIL 10, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

ACTION at law upon a policy of fire insurance in the defendant company, covering a sawmill, fixtures, and appliances, in the state of Florida. The defendant denied liability, and on the issues joined, the case was tried to the court without a jury, resulting in a judgment for plaintiff, and defendant appeals.—*Affirmed.*

Johnston Bros., for appellant.

Chas. S. Macomber, for appellee.

DEEMER, C. J.—I. The policy was issued June 22, 1910, and was for the term of one year. The fire occurred October 5, 1910, and plaintiff claims to have made proofs of loss within a few days thereafter. Defendant averred in its answer that the policy never became effective because plaintiff did not pay the premium thereon. It denied having received proofs of loss. It also averred that there was a warranty clause attached to the policy, which was as follows:

“WARRANTY CLAUSE.

“This policy is issued upon the understanding and warranty by the assured, that the Anchor Fire Insurance Company of Iowa has now a policy or policies in force, insuring the identical property described in this policy for the sum of \$1,000 in form concurrent herewith, in identically the same proportions on each part thereof and at no higher rate of premium; and that said policy or policies as now written will be continued in force during the entire currency of this policy; otherwise this policy is void. It is further covenanted and agreed that no change or waiver of this warranty shall

be made without the written consent of this association, signed by an officer endorsed upon this policy and it is agreed if the conditions of the policy and warranty are fulfilled by the assured that this association in case of loss will follow the same adjustment and settlement of its liabilities as made by the on the above described policy No. 95351 of the Grain Shippers Mutual Fire Insurance Association of Ida Grove, Iowa.

“Ida Grove, Iowa, June 2, 1910.

“F. D. Babcock, Secy.”

And that among other things, the policy contained the following provision:

“This policy is made and accepted subject to the foregoing stipulations, and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer or agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such conditions or provisions, unless such waiver if any, shall be in writing upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.”

It averred that this warranty clause was not complied with by plaintiff, and that she permitted the policy held by the Anchor Company to lapse, or to become cancelled; and that no substitution of companies was ever made or assented to by it. It also pleaded that because of plaintiff's failure to pay the premium and to keep the warranty clause in force, the policy was duly cancelled, and plaintiff is not entitled to recover thereon. Plaintiff, in an amendment to her petition,

pleaded that when the Anchor Company cancelled its policy, she took out a policy for a like amount in the National Fire and Marine Company of New Jersey, and notified defendant of that fact, receiving the following letter in answer:

“Ida Grove, Iowa, Sept. 24, 1910.

“Mr. R. S. Mahoney, Fernandina, Florida. Dear Sir: Replying to your favor of September 20th, received this morning. Our records show that policy No. 95351 has been paid for, although our broker in Chicago is not Mr. F. R. Thompson, but there are a good many brokers at 159 La Salle Street, or at least in that building. Our records show also that on September 8th, our broker in Chicago advised us that the warranty on policy No. 95351 had been changed to the National Fire & Marine Insurance Company of New Jersey for \$1,000. Your letter asks us to change it to the National Insurance Company of Elizabeth, N. J. Now if that should not be the same insurance company as the National Fire & Marine Insurance Company, we shall be pleased to send you an indorsement or substituted warranty, and pending an answer to your letter the policy will be in full force provided the warranty company is either one of the companies above mentioned.

“Very truly yours,

“F. D. Babcock, Sec’y.”

And in this connection, she averred:

“And this plaintiff states that while this letter was addressed to Mr. R. S. Mahoney, it was intended for her and in reply to her inquiry concerning her policy No. 95351 in said company. And she states that when she received said letter she believed that the secretary of defendant company was stating the facts, and she relied upon his statements as being the facts, and she now states that they were the facts when he wrote them, and she believes them to be the facts now, and they are the facts and she firmly relied upon said

statement, and it was on account of said letter that she took no steps to have a warranty clause sent her substituting the National Fire & Marine Insurance Company in place of the Anchor Fire Insurance Company of Iowa, firmly and truly believing that it was not necessary for her to do anything further. And she also states that she believes that Mr. Babcock told the truth when he said that the defendant company had been paid the premium for policy No. 95351 and that she now believes he told her the truth, and that said company had been paid said policy's premiums—she had sent a check to her agent, F. R. Thompson, for the purpose of paying said premium. And she further states that at all times and in all manners she complied with every requirement of her policy with defendant company, save where said defendant company has expressly waived its provisions as it did in having the warranty clause attached to its permission endorsed on her policy. And plaintiff states that defendant company waived by its secretary's letter and requirement, relating to said warranty clause and is estopped now from making any defense for the reason that no warranty clause was attached or endorsed on said policy. Wherefore plaintiff demands that the defendant company be estopped from pleading and defending this action for the reason that said warranty clause substituting the National Fire and Marine Insurance Company in place of the Anchor Fire Insurance Company was not attached to or endorsed on her said policy, and she demands judgment against the defendant company for the full amount of her damages under said policy, to wit, the sum of \$1,000 and costs."

Such were the issues on which the case was tried, and it is now insisted that the trial court was in error in rendering judgment for the plaintiff, for the reason that practically all of defendant's defenses were established by the evidence.

II. As to proofs of loss: The testimony on this point comes from plaintiff and the cashier of her bank in Florida,

and is to this effect: the cashier simply testified that before him as a notary public, plaintiff verified proofs of loss; and plaintiff testified that she verified the same before the cashier as notary public, and that she mailed sworn proofs of loss to the defendant company. The secretary of the company said that neither he, as secretary, nor the company ever received any proofs of loss. It appeared during the examination of plaintiff that defendant was contending that it never received any proofs of loss; hence, notice to it to produce the same would have been a useless formality; and plaintiff also testified that she did not keep a copy of what she mailed to defendant. Under this state of facts, the trial court was justified in finding that plaintiff made out and duly mailed proofs of loss to the defendant.

III. As to the warranty clause: It is agreed that the Anchor policy was cancelled, but plaintiff contends that another was substituted in its place by agreement with the defendant company. Defendant denies the agreement, and also asserts that if any such agreement was made, it was invalid because not endorsed upon or added to the original policy, as provided therein. It is a well-established rule of this court that a defendant insurance company may waive a condition made for its benefit, especially such an one as that here relied upon, by the making of an agreement which it does not insist upon having attached to or added to its policy. *Bloom v. Ins. Co.*, 94 Iowa 359; *Liquid Carbonic Co. v. Ins. Co.*, 126 Iowa 225.

In the letter attached to plaintiff's amendment to the petition heretofore quoted, written by defendant's secretary to the plaintiff, under date of September 24, 1910, it appears that the substitution of a policy issued by either of the New Jersey companies named was agreed to, and that, pending answer to the letter, the policy would be regarded in full

force if there was a policy in either company to the amount of \$1,000.

We may remark parenthetically that S. R. Mahoney was plaintiff's maiden name, and that the letter reached plaintiff in due course. It appears that plaintiff had a policy for \$1,000 in the National Fire & Marine Insurance Company of Elizabeth, New Jersey. The letter from plaintiff to the defendant which called forth the letter from the company of date September 24th, already referred to, is as follows:

"No. of Policy 95351.

"Fernandina, Fla., Sept. 20, 1910.

"Mr. F. D. Babcock, Dear Sir:—I have your policy for \$1,000 on sawmill at Highland, Fla. It has a warranty clause for the Anchor Insurance Co. of Iowa, which time has expired, and I do not deem it necessary to renew. Will you send me a warranty clause and make it for the National Insurance Company of Elizabeth, New Jersey, in which company I have \$1,000 and believe it a good company. Kindly send me the *clause at once* and let me know if Mr. F. R. Thompson of 159 La Salle St., Chicago, Ill., has paid you for this policy. I sent him \$73 & 50c (73.50) about the 25th of June to pay for this policy, was not this amount too much? I will prefer to deal with you direct, as I have had some trouble in his *not* paying a policy in another company. Will appreciate your sending clause to me direct and thanking you, I am

"Very respect.,

S. R. Mahoney,

"Fernandina, Fla."

On the 27th of September, plaintiff responded to defendant's letter of September 24th, and the only thing in the record showing the nature of this letter is the testimony of the defendant's secretary as to its contents, as follows:

"I remember in a general way the contents of the letter of Mrs. Black to us under date of September 27, 1910. She

asked us to send the clause to attach to that policy, the warranty clause."

To this defendant made the following response:

"Oct. 3rd, 1910.

"Mr. S. R. Mahoney, Fernandina, Fla. Dear Sir: Your letter of Sept. 27th, asking for substituted warranty for policy No. 95351 is received, and we have referred this matter to our broker in Chicago, who wrote this business for us.

"Very truly yours,

"F. D. Babcock, Secretary."

At the same time, defendant wrote its Chicago broker as follows:

"Oct. 3rd, 1910.

"Messrs. Chas. Brock Jones & Co., Chicago, Ill. Dear Sirs: As requested in your favor of October 1st under another cover we will send you a supply of envelopes.

"We are requested by S. R. Mahoney to attach a warranty clause to our policy No. 95351 to read 'The National Fire Marine Insurance Company of Elizabeth, N. J.' I will write Mr. Mahoney that we have referred the matter to you; this being agreeable to your letter of the 26th ult. I suppose of course you have the money for this policy long since and turned it over to us.

"Very truly yours,

"F. D. Babcock, Secretary."

As already indicated, the fire occurred October 5th, and so far as shown, nothing else was done regarding the substituted warranty clause, save that on the 3rd day of October, the insurance broker in Chicago through whom plaintiff obtained her policy in the defendant company wrote the following letter to the recognized Chicago broker for the defendant company:

“Oct. 3rd, 1910.

“Messrs. C. Brock Jones, 159 LaSalle St. Gentlemen: Several days ago you stated that the home office of the Grain Shippers had written you that S. R. Mahoney assured under No. 95351 had written the home office requesting a change of warranty, and I told you not to make it on account of all the other companies cancelling off. I don't know just what is the matter, but it occurred to me that it was good risk to get off of, so I wrote the assured to return the policy. Kindly advise the home office that in event the policy is sent in for cancellation, to return it with the statement, that it must be returned through the same source that it was procured. I haven't had a settlement yet, and think this will force it.

“I thank you very much for your courtesy.

“Yours very truly, F. R. Thompson.”

And this broker on the same date also wrote plaintiff the following:

“Chicago, October 3d, 1910.

“S. R. Mahoney, Esq., Fernandina, Fla. Dear Sir: Up to this writing you have not returned Grain Shippers policy No. 95351, and every day that you delay it means just so much less return premium. Don't you think it advisable to return it immediately? Awaiting which I am,

“Yours very truly,

“(Signed) F. R. Thompson.”

Under this state of the record, the trial court may well have found that the defendant itself, by its letter of September 24th, recognized the policy as in full force, provided plaintiff had insurance in either of the New Jersey companies, at least for such a reasonable time after the writing of the letter as in the circumstances would be proper for a reply. Plaintiff did reply on the 27th, asking for a warranty clause to be attached to the policy, and on October 3rd wrote plaintiff the letter already quoted, and also to its Chicago broker. Plaintiff, however, denies receiving any letter from defendant after the

one dated September 24th. In these latter letters, there was no suggestion that the defendant was receding from the proposition contained in its letter of September 24th, and we are constrained to agree with the trial court in its holding that the attachment of the warranty clause was waived.

IV. As to the payment of the premium: Plaintiff secured her policy by correspondence from one F. R. Thompson of Chicago, Illinois, who was an insurance broker residing in

4. INSURANCE: that city. Defendant says that Thompson was
premiums: not its agent or broker, and plaintiff testified
payment: that she employed him as an agent or broker
estoppel. to place \$3,000 of insurance for her, but that she did not employ him generally and did not recognize his right to cancel or receive notices of the cancellation of policies, or to make settlement of her policy rights in the defendant company. For the purposes of the case, we must treat Thompson as plaintiff's agent with reference to the policy in suit. Defendant has at all times taken the position that he was not its agent, although for some purposes it is now seeking to rely upon what he did as its agent. We do not seem to have the full correspondence which passed between these parties; but from what we do have, it appears that plaintiff was directed to Thompson by a local insurance agent in Florida, and that she wrote him to place \$3,000 of insurance for her upon her mill property. The following correspondence, given chronologically, between plaintiff and this broker is all that appears in the record:

“Chicago, July 2nd, 1910.

“Mr. S. R. Mahoney, Fernandina, Fla. Dear Sir:—I have been able to secure another \$1,000 on your sawmill in the Grain Shippers of Iowa, and herewith enclose its policy, No. 95351.

“I have found this company to be equitable in its adjustment of its losses and prompt in its payments.

“I shall endeavor to secure the other \$1,000 but I have run out of the *printed forms such as are attached* to this pol-

icy. If you *will send me seven or eight*, I shall appreciate it very much.

Yours very truly,

“(Signed) F. R. Thompson.”

“Aug. 31st, 1910.

“Mrs. S. R. Mahoney, Fernandina, Fla. Dear Madam:— I am herewith enclosing my check No. 915 payable to your order in the sum of \$68.75 for unearned premium on Anchor policy No. 105479, also check No. 916 in the sum of \$59.30 for unearned premium on Security Mutual No. 100362.

“Grain Shippers policy No. 95351 contains a warranty clause that the Anchor Fire Insurance Company of Iowa will retain at all times during the currency of the Grain Shippers policy, at least \$1,000, and as the Anchor policy has been cancelled the Grain Shippers policy will be automatically cancelled. It becomes necessary to change this warranty clause, so as to follow some other company. You wrote me some time ago that you had a policy in the National Fire & Marine Insurance Company of New Jersey for \$1,000, and if this is still in force, I will have the warranty clause substituted on the Grain Shippers policy to follow the National. Please advise me on this point immediately, thus obliging,

“Yours very truly,

F. R. Thompson.”

“Chicago, Sept. 10th, 1910.

“S. R. Mahoney, Esq., Fernandina, Fla. Dear Sir: I find that through an error I sent you my check No. 915 in the sum of \$68.75 for return premium on Anchor policy No. 105479; when in reality you had not paid the premium on it, which amounted to \$73.50. Therefore, it will be necessary for you to send me by return mail a check in the sum of \$73.50. The policy had earned \$4.75 for the time that it was in force, which was nearly a month. Altogether I sent you three policies, namely the Security, Grain Shipper, and Anchor, each was in the sum of \$1,000 making a premium on each of \$73.50, or a total of \$220.50. The Security and Anchor policies were cancelled, and I sent you separate checks for the return

premium on each, thinking that you had sent me checks for the full premium of \$220.50, while in reality you sent but \$147.00.

"If you will send me a check for \$73.50 by return mail, I will see that a new warranty clause is made out for the Grain Shippers policy, so as to keep it in force, and also place the \$3,000 which you ordered a few days ago if possible. Thanking you very much for your prompt compliance, I am,

"Yours very truly,

"(Signed) F. R. Thompson."

"Fernandina, Fla., Sept. 14, 1910.

"Mr. Thompson: Dear Sir:—Your letter arrived; I sent you \$147.00 and have only one policy the Grain Shipper, which is not worth a penny without that clause in it, therefore it is your duty to send it at once to me or cancel premium. I figure you owe me \$65.30 on the cancelled premium of another company (have forgotten name) and sent on draft which was long since due, the protest fee was \$2.58 which I enclose.

"Now I shall not send you a check until you send me the clause for the Grain Shipper's policy as it is not worth anything as it stands and for two months now I have been paying for a policy which is no good. After this if you want to write a policy for the 3 thousand and do not care to trust me, you can send it to the bank here. Please let me hear from you at once. Very respectfully, S. R. Mahoney."

"Sept. 17th, 1910.

"Mrs. S. R. Mahoney, Fernandina, Fla. Dear Madam: I am obliged to report to you my inability to execute your order of \$3,000 on your sawmill, although I have tried every available capacity.

"Regarding your remarks in your letter of the 14th, pertaining to protest fees, will say that I see no reason why you should have drawn on me for return premium, and especially so as I had sent you two checks covering return pre-

miums, when in reality I should have sent you but one, on account of your not having paid the original premium on the Anchor policy.

"The Grain Shippers policy, as it stands today, is not valid on account of the warranty clause being violated by cancellation of the Anchor policy, and for that reason, I think it best for you to return the policy so that the return premium may be collected thereon.

"If you will return the policy in enclosed envelope, I will have it cancelled and return premium collected at an early date.

Yours very truly,

"F. R. Thompson."

"Fernandina, Fla., Sept. 20, 1910.

"Mr. F. R. Thompson, Dear Sir:—Please send me your check for cancelled premium on policy Grain Shippers—it has been no good since 1st day of Aug.—when the Anchor was cancelled. Please figure to that time. Cancelled premium are dollar for dollar and no discount which your check did not give me. I enclose letter from A. J. Van Dunn & Co., which explains itself. Had the mill burned, where would I have been. Now if you do not send me the amount I shall take it up with the Grain Shippers people direct. You can send your check to First National Bank with the request to forward Grain Shippers policy, they do not charge me for any such collection. I have had awful experience with the rascality of insurance agents in the past year and you will have to excuse me if I am a trifle particular, and try to keep my eyes open. Hoping this explanation is satisfactory, I am,

"Very respectfully,

S. R. Mahoney."

On the same day this letter was written, plaintiff sent her letter to the defendant company, under date of September 20th already quoted. This was followed by one from Thompson to plaintiff, under date September 23, 1910, as follows:

“Chicago, Sept. 23, 1910.

“Mrs. S. R. Mahoney, Fernandina, Fla. Dear Madam: I have yours of the 20th regarding Grain Shippers policy. In reply would say that I cannot make any returns on this policy until you send the policy to me, so that I can cancel it with the company, and secure the return premium. When this is done I will make an accounting with you immediately.

“Be kind enough therefore, to return the policy by return mail thus obliging,

“Yours very truly,

F. R. Thompson.”

This was all which passed prior to the fire. But under date of October 10, 1910, Thompson wrote plaintiff as follows:

“Chicago, Oct. 10th, 1910.

“Mrs. S. R. Mahoney, Fernandina, Fla. Dear Madam: I received your telegram of the 6th, and also your letter of even date, to the effect that your mill at Highland had been destroyed by fire. For two months I have been trying to get you to balance your account by paying the amount due per the statement rendered you the first part of August amounting to \$73.50, but for some reason or other you did not remit. And in the meantime the Chicago agent of the Grain Shippers decided it was best to retire its policy, and I wrote you to return it, at the same time advising you that I was unable to complete your order for further insurance on the mill. The Chicago agent of the Grain Shippers is Messrs. Charles Brock Jones & Co., 159 La Salle Street, Chicago, and with whom you will have to communicate regarding this policy.

“Yours very truly, (Signed) F. R. Thompson.”

And thereafter, under date of January 20, 1911, Thompson wrote defendant's acknowledged broker the following:

“Chicago, January 20, 1911.

“Messrs. Chas. Brock Jones & Co., Agents, Grain Shippers Mutual Fire Ins. Co., 159 La Salle St., City. Dear Sir: I desire to verify my conversation with you regarding the

warranty clause under policy No. 95351, S. R. Mahoney, to the effect that I did not deliver warranty clause substituting the National F. & M. in lieu of the Anchor. I wrote the assured under date of September 17th, 1910, (copy of which letter you have in your possession) that the Grain Shippers policy as it stood on that date is not valid on account of the warranty clause being violated by cancellation of the Anchor policy, and for that reason requested the return of the policy for cancellation. Under date of September 20, 1910, assured wrote me in reply (copy of which you have) that the Grain Shippers policy had been no good since August 1st, 1910. Regarding the payment of the premium, I wish to say that originally I placed three policies for this assured with a premium of \$73.50 on each policy and received a check from assured for \$147.00. Two policies were cancelled and I sent separate checks for the return premium thereunder, which you can readily see balanced the account on my books.

"I think this is the information desired by you, and remain, Yours very truly, (Signed) F. R. Thompson."

This closed the correspondence, except the letter hitherto quoted, under date of October 3, 1910, from Thompson to the plaintiff. From this it appears that the trial court was justified in finding that both Thompson and the defendant (the latter by admission in its letter of September 24th) received the premium on the policy, or that defendant is estopped from denying that it received it.

V. As to the cancellation of the policy: This is the most troublesome question in the case. If Thompson were defendant's agent, it might well be found that the policy was can-

5. INSURANCE:
cancellation:
question of
fact.

celled both for nonpayment of premium and because of breach of the warranty clause.

But it is practically conceded that Thompson was plaintiff's agent, and the only effect which can be given to the correspondence which passed between plaintiff and this agent, is to show plaintiff's intent in the matter, or her

admissions. The latter may be shown by her declarations to her own agent and the correspondence which passed between them; but defendant cannot rely upon this correspondence as an estoppel; for it was not addressed to its agent, nor did it have any knowledge thereof. In its own correspondence with plaintiff, it admitted the receipt of the premium and consented to the substitution to meet the warranty clause, and it at no time before the fire claimed that the policy had been cancelled or forfeited for nonpayment of premium or for any other reason. On October 3rd, defendant wrote its own agents, Chas. Brock Jones & Company, to the effect that it approved of the substitution of the New Jersey company for the Anchor Company. It also assumed that it had the premium for the policy. It is true that, on October 3rd, Thompson wrote plaintiff, reminding her that she had not returned her policy in defendant company, and suggested that she do so immediately; and on the same day, he wrote defendant's Chicago brokers or agents, advising them not to make the change of warranty and suggesting that this was a good risk "to get off," and that he had written plaintiff to return the policy. He also asked that if the policy be returned for cancellation, it be sent to him in order that he might force a settlement. Here again we think the question of cancellation was one of fact for the court. As it found there was none, we are not disposed to interfere. The Chicago broker or agent, Thompson, was evidently not working in the interest of his principal, the plaintiff, and what he did, did not amount to a cancellation of the policy; and the defendant itself did nothing before the fire toward cancelling the policy, nor did its agents, Jones & Co., do anything along that line. The trouble seems to have been between plaintiff and her agent, the latter either looking after his own personal interests, or trying to get rid of the policy for the protection of the company, rather than for the benefit of his principal.

The record is not as complete as it might have been

made; but enough appears to justify the finding of the trial court, and its judgment must be, and it is—*Affirmed*.

LADD, GAYNOR and SALINGER, JJ., concur.

SIMON CASADY & COMPANY, Appellants, v. OSCAR M. HARTZELL et al., Appellees.

BANKRUPTCY: Attachment Lien—Delivery Bond—Nullification by Bankruptcy Proceeding. An attachment lien is wholly destroyed by the filing of a petition in bankruptcy within four months, followed by an adjudication of bankruptcy. (Federal Act, July 1, 1898, Ch. 541, Sec. 67f, Comp. Stat. 9651.) The attachment lien being carried down, a *delivery* bond given by the defendant in attachment, under Sec. 3909, Code, conditioned for the delivery of the property, etc., to satisfy any judgment rendered against such defendant, is likewise carried down, and the surety is no longer liable thereon.

Appeal from Madison District Court.—HON. W. H. FAHEY, Judge.

THURSDAY, FEBRUARY 18, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

ACTION on certain notes and an overdraft aided by attachment. After the property levied on was discharged by the execution of a delivery bond, the defendants were adjudged bankrupts. Thereupon, plaintiff amended the petition by praying that judgment be enjoined in order to adjudicate defendants' liability as a basis for an action against the surety on the delivery bond. The relief was denied and plaintiff appeals.—*Affirmed*.

A. A. McGarry, for appellants.

Parsons & Mills and A. W. & P. R. Wilkinson, for appellees.

LADD, J.—A petition was filed June 23, 1908, praying for judgment on four notes, of the face value of \$3,454.84, and an overdraft of \$426.49, with accrued interest. This petition

was aided by a writ of attachment which was levied on certain real estate and a large amount of personal property. On the same day, the defendant, O. M. Hartzell, with Frank L. Hall as surety, released the personal property from the levy by executing a delivery bond in the penal sum of \$9,000, conditioned that if the defendants “shall deliver said property or its estimated value (\$25,000) as aforesaid to said sheriff to satisfy any judgment that may be rendered against said defendant in said suit within twenty (20) days after the rendition thereof, then this obligation to be void; otherwise to remain in full force and virtue.” An answer, setting up that defendants had been adjudged bankrupts and asking that the action abate, was filed May 5, 1911. An amendment to the petition was filed October 4, 1913, in which the issuance and levy of the writ of attachment, the execution of the delivery bond and the adjudication that defendants were bankrupts on the 1st and 10th days of August, 1908, were alleged, and also that, in order to hold the surety (Hall), it was necessary first to obtain judgment against defendants for the purpose of fixing the liability of Hall, whereupon it should be perpetually enjoined, and such judgment was prayed. The defendants first demurred to the petition, and when the demurrer was overruled, answered, in substance pleading their discharge in bankruptcy as a defense. The issues were submitted on an agreed statement of facts, from which it appears that the indebtedness was as stated, amounting to \$6,418.51 March 4, 1914; that the levy of the writ and the execution of the bond, as well as the adjudication in bankruptcy, were as recited; and that the personal property levied on belonged to O. M. Hartzell, was worth \$21,500, and was taken possession of by the trustees and sold under the orders of the bankrupt court, and the proceeds

1. BANKRUPTCY:
attachment
lien: delivery
bond: nullifi-
cation by
bankruptcy
proceeding.

applied to the partial extinguishment of the liens. As the indebtedness may not be enforced against defendants, the sole purpose of obtaining judgment against them is to fix the liability of the surety on the delivery bond. Our statute provides that "The defendant, or any person in whose possession any attached property is found, or any person making affidavit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, or after the return of the writ by the clerk, in a penalty at least double the value of the property sought to be released, but if that sum would exceed double the amount of the claim for which an attachment is sued out, then in such sum as equals double the amount of such claim, conditioned that such property or its appraised value shall be delivered to the sheriff, to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court." (Sec. 3909, Code.)

The sections following relate to ascertaining the value of the property, and Sec. 3911 declares that if the principal did not own the property at the time, or it was exempt at the time, either fact would be a defense. No such defense is interposed, and the only issue is whether, under the peculiar facts of the case, the conditions of the bond may be enforced, it being contended, on the one hand, that under Sec. 67f of the Bankruptcy Act of 1898 (30 U. S. Stat. at Large, 565), the levy of the writ of attachment and delivery bond became void, and on the other, that, by virtue of Sec. 16 (30 U. S. Stat. at Large, 550), the liability of the surety on this bond was saved.

Sec. 16 reads: "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Sec. 67f provides: "That all levies, judgments, attach-

ments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon, the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

The language of this last section differs from that on the same subject (Sec. 14) of the Act of 1867 (14 U. S. Stat. at Large, 522), which read:

"And such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

Such difference is said to furnish a sufficient basis for distinguishing some of the cases construing that act and to justify a different conclusion on identical facts under the later act. For the purposes of the case at bar, it is not important whether the attachment was merely "dissolved" or rendered "null and void" by the bankruptcy proceedings; for, in either event, these terminated all obligation on the delivery bond. It is apparent that the effect of Sec. 67f of the Act of 1898 is not to avoid attachment, levies or liens therein referred to against all the world, but merely as against the trustee in bankruptcy and those claiming under him, so

that the property may pass to and be distributed by him among the creditors of the bankrupt, and such is the view entertained by several well-considered cases. *McKenney v. Cheney*, 11 Am. B. Rep. (Ga.) 54; *Frazee v. Nelson*, 179 Mass. 456 (61 N. E. 40). There is some conflict in the authorities as to whether Sec. 67f has any application to voluntary bankruptcy; but as the question is not argued, we shall assume, as the parties hereto have, and in harmony with the weight of authority (see *McKenney v. Cheney*, *supra*, with cases therein cited), that said section is applicable to voluntary as well as involuntary bankruptcy. Had four months or more intervened between the levy of the writ of attachment and the filing of the petition in bankruptcy, that section would not have been applicable, and plaintiff might be entitled to the relief prayed. *Hill v. Harding*, 130 U. S. 699, 703 (32 L. Ed. 1083, 1084); *Butterick Pub. Co. v. Bowen Co.*, 26 Am. B. Rep. (R. I.) 718; *Kendrick & Roberts v. Warren*, 110 Md. 47 (72 Atl. 461).

As less than four months intervened, the provisions of Sec. 67f must be given effect and the right of plaintiff to judgment necessarily depends on whether the conditions of the delivery bond were avoided thereby. It will be observed that the function of the delivery bond is merely to discharge the property. It does not dissolve the attachment, but takes the place of the lien. The attachment continues, the bond being conditioned to turn the property or its value over to the sheriff when required, to satisfy the debt, and thereby discharge the same. The obligation is not to satisfy the judgment but to deliver to the sheriff the property levied on, out of which to satisfy the execution against the property condemned by the judgment for its satisfaction. Until then, the attachment does not cease and the bond merely stands in the place or stead of the property levied on. The consequence is that dissolving the attachment, as under the Bankruptcy Act of 1867, or rendering it "null and void" and discharging and releasing the property affected by the levy or attach-

ment, under the Bankruptcy Act of 1898, necessarily carries down with it the delivery bond conditioned for the forthcoming of the property to be disposed of under the writ of attachment. The attachment having been nullified, the lien of any levy thereof is dissolved, and the happening of the contingency on which the efficacy of the bond depends is rendered impossible; for, no attachment or levy remaining, judgment sequestering the property to the satisfaction of the debt may not be entered. In other words, as the lien of the attachment remains in legal contemplation through the delivery bond as representing the property, it inevitably follows that whatever destroys the attachment destroys all liability upon the bond. *Schunack v. Art Metal Novelty Co.*, 26 Am. B. Rep. (Conn.) 731.

Any other conclusion would lead to the absurd result that the surety on such a bond might be compelled to deliver property included therein or pay its value to discharge the portion of the debt remaining unsatisfied by dividends in bankruptcy, notwithstanding the fact that the identical property had been seized by the trustee in bankruptcy by virtue of Sec. 67f, reduced to money and distributed to the creditors of the estate. The liability of the surety in such a case is not affected by the discharge in bankruptcy, but is avoided in consequence of the adjudication of bankruptcy. The efficacy of the delivery bond, as it stood for the property attached and in lieu thereof, ceased with the attachment and became "null and void," because of the adjudication that the defendant Hartzell was a bankrupt. We have discovered no decision precisely in point, but our conclusion finds support in *Windisch-Muhlhauser Brewing Co. v. Simms*, 55 South. (La.) 739; *Crook-Horner Co. v. Gilpin*, 112 Md. 1 (28 L. R. A. (N. S.) 233; 136 Am. St. 376); *Payne v. Able*, 7 Bush (Ky.) 344 (3 Am. R. 316); *Hamilton v. Bryant*, 114 Mass. 543; *House v. Schnadig*, 235 Ill. 301 (85 N. E. 395); *Keyes v. Shannon*, 8 Rob. (La.) 172 (41 Am. D. 299); *Klipstein v. Allen-Miles Co.*, 136 Fed. 385; Collier on Bankruptcy, 377.

The annotator in *Stull v. Beddeo*, 14 L. R. A. (N. S.) 507, 510, deduces this conclusion, after a review of the authorities:

“Where, however, the attachment proceedings are not commenced more than four months prior to the bankruptcy proceedings against the debtor, no valid lien is obtained, and the rule sustaining the liability of the surety on the theory that the bond stands in lieu of the property attached no longer obtains; and the doctrine that the discharge of the debtor or principal will prevent the happening of the contingency upon which the liability of the surety depends, and therefore operate to release him, will apply.”

McCombs v. Allen, 82 N. Y. 115, is often cited as holding to the contrary, but an examination thereof discloses that the undertaking of the sureties there considered was to pay on demand the amount of judgment which might be recovered in an action then pending against the defendant in attachment proceedings, and it appeared that judgment had been rendered against the principal and sureties in the lower court, so that the contingencies upon which the liability of the surety depended actually happened.

As no recovery might be had on the bond, there is no occasion for the entry of the judgment such as is prayed.—*Affirmed.*

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

KATE D. FUNK, Appellee, v. ANCHOR FIRE INSURANCE COMPANY, Appellant.

INSURANCE: Insured Not “Unconditional and Sole Owner”—

- 1 **Knowledge—Waiver—Estoppel.** An insurance company that issues a policy to one who has an insurable interest in the property, but who, it knows, is not the “sole and unconditional” owner, and collects the premium and later makes the policy

payable to a mortgagee, knowing that the mortgagee was taking the policy as security for a loan, waives absolutely, and is estopped to insist on, the provision of the policy that the "policy shall be void if the interest of the insured be other than unconditional and sole owner."

INSURANCE: Condition of Title—Knowledge of Company through
2 Agent—Sufficiency of Evidence. A finding that an insurance company had knowledge of the actual ownership of insured property is justified by a showing that the agent of the company (a) took the acknowledgment of the deed which showed the condition of the title and (b) prepared for the actual owner, and had in his possession, an abstract of title to the property showing the actual ownership.

INSURANCE: "Insurable" Interest—Homestead in Property. A
3 homestead interest in property is an insurable interest.

INSURANCE: Forfeiture—Foreclosure "With Knowledge of In-
4 sured"—Service by Publication—Strict Construction of Policy. A policy of insurance, payable to a mortgagee, is not voided under a clause providing that "if, with the *knowledge of the insured*, foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy, by virtue of any lien . . . thereon, this policy shall be void," when, in the foreclosure proceedings and sale, service on the insured was by *publication* only. Constructive notice is not "knowledge" within the meaning of the policy.

INSURANCE: Forfeiture under Mortgage Foreclosure Clause—Con-
5 sent to Mortgage—Effect. A forfeiture of a policy of insurance cannot be predicated on a provision that the policy is voided, "if foreclosure proceedings be commenced . . . by virtue of any lien . . . " on the property, when the foreclosure complained of was of a mortgage to which the insurance company had consented.

INSURANCE: Forfeiture—Prohibited Change of Possession—Tenant.
6 The fact that there is some shadowy showing in the record that a party was in possession, at one time, of the insured premises, possibly as a tenant, is wholly insufficient on which to base a forfeiture under the clause of the policy that "if any change other than by death of the insured takes place in the possession of the property . . . the policy shall be void."

Appeal from Muscatine District Court.—HON. A. P. BARKER,
Judge.

FRIDAY, SEPTEMBER 24, 1915.

ACTION by mortgagee on a policy issued to mortgagor and made payable to mortgagee as her interest might appear. Judgment and decree in the court below for the plaintiff. Defendant appeals.—*Affirmed.*

E. M. Warner, and E. F. Richman, for appellee.

Sullivan & Sullivan, for appellant.

GAYNOR, J.—This action is brought by the plaintiff against the defendant company upon a certain policy of insurance, issued on the 28th day of November, 1904, in which defendant company undertook to and did insure, by the terms of the policy, the premises in controversy against loss by fire for the term of five years. The plaintiff bases her right to recover from the company upon the following facts, which are not disputed in this record:

On the 3d day of June, 1905, she loaned to one Lulu R. Henning \$550.00, and took a mortgage upon the premises insured to secure the loan. At the time the loan was made by the plaintiff to Mrs. Henning, the policy in controversy was delivered to the plaintiff by one H. H. Arnold, with the following endorsement upon it:

“Permission is granted for encumbrance upon the real property insured in this policy not to exceed the principal sum of \$550.00 and loss, if any, is made payable first to Kate D. Funk, of Muscatine, Iowa, mortgagee, (or trustee), as her interests may appear, subject to the conditions of this policy.

“Attached to and made a part of policy No. 49832, of the Anchor Fire Insurance Company, of Des Moines, Iowa, this 28th day of November. (Signed) H. H. Arnold, Agent.”

The property covered by said policy and by said mortgage was totally destroyed by fire on the 9th day of February,

1908. Due notice of loss was given as required by the terms of the policy.

The defendant interposes certain defenses to plaintiff's right to recover.

1. That the policy in question was issued to W. F. Henning, who stated that he was the unconditional and sole owner of the property, and that the defendant had no knowledge that he was not the owner, until long after the destruction of the property by fire; that he was not in fact the owner at the time the policy was issued; that the property was owned by his wife, Lulu R. Henning; that W. F. Henning wrongfully and fraudulently concealed this fact from the defendant; that the policy provided by its terms: "This policy shall be void . . . if the interest of the insured be other than unconditional and sole owner"; that the said W. F. Henning was not the sole and unconditional owner of the premises at the time the policy was issued nor at the time the loss occurred; and that, by reason thereof, the policy was not in force at the date of the destruction by fire.

2. The defendant alleges, as a complete defense to plaintiff's claim, that the contract of insurance further provided: "Or if any change, other than by death of the insured, whether by legal process, judgment, voluntary act of the insured, or otherwise, take place in the possession, or in the interest or title of the insured in or to the property covered by the policy . . . or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of the sale of any property of this policy by virtue of any lien or incumbrance thereon, this policy shall be void."

That, after the issuance of the policy and before the destruction of the property by fire, this plaintiff commenced a suit against W. F. and Lulu R. Henning upon a certain mortgage upon the premises covered by the policy, and judgment was rendered in foreclosure proceedings against W. F. Henning and Lulu R. Henning and a decree of foreclosure entered,

and sale made under special execution, and possession of the property taken by the plaintiff herein; that this defendant had no notice or knowledge of the foreclosure proceedings until after the destruction of the property; that by reason of this fact the policy, by its terms, became void, and was not in force at the date of the destruction of the property.

Plaintiff in reply pleads an estoppel and says that H. H. Arnold was the agent of the defendant and issued the policy and knew, at the time the policy was issued, that the property belonged to Lulu R. Henning; and that, with full knowledge of this fact, he issued the policy to W. F. Henning; that with full knowledge of the fact that the property belonged to Lulu R. Henning, he undertook, as agent of defendant company, to issue insurance that would protect the plaintiff's mortgage interest, and delivered to the plaintiff the policy in suit, both as the agent of the defendant and of Lulu R. Henning, and the plaintiff accepted and relied upon the same. Plaintiff denies that W. F. Henning made any representations to the defendant as to his ownership of the property, or that he fraudulently concealed the knowledge of the exact title at the time the policy was issued.

Upon the issues thus tendered, the cause was tried to the court, and judgment and decree entered for the plaintiff as prayed. From this judgment, the defendant appeals.

The facts disclosed by the record appear to be substantially as follows:

W. F. Henning and Lulu R. Henning were husband and wife, and resided upon the property in controversy as their homestead. Prior to the 2nd of August, 1902, the title to the property was in W. F. Henning. On that day, he conveyed the title to his wife, Lulu R. Henning. The title continued in her until the 11th day of November, 1908. On the 28th day of November, 1904, defendant company issued this policy of insurance to W. F. Henning for the sum of \$500 for the term of five years. On the 3d day of June, 1905, the

plaintiff made a loan of \$500 to Lulu R. Henning, the note being signed by Lulu R. Henning and her husband, W. F. Henning, and the same was secured by a real estate mortgage on the homestead. At the time said loan was made, some controversy arose as to whether or not the real estate, independent of the building thereon, was sufficient security for the loan, and the plaintiff was informed that there was a policy of insurance upon the building on the premises. At the time the loan was made and the mortgage executed, the policy in controversy, with the mortgage clause endorsed, was delivered by one H. H. Arnold to Mr. E. F. Richman, the attorney for the plaintiff, in the presence of Mrs. Henning, and the policy continued in the possession of Richman, as attorney for plaintiff, up to the time of the commencement of this trial. The lot on which the insured building stood was worth not to exceed \$200. Upon making the loan, Richman, representing the plaintiff, went to see the property. Richman testifies:

“The application for the loan from Mrs. Funk to the Hennings came from H. H. Arnold. He was a loan agent. He represented that he had an application for a loan, but had no funds, and wanted to know if I could make it. I told him if the security was satisfactory I would do so. I went to see the property. The lot itself was probably not worth more than \$200. Without the insurance on the house, the security would not be sufficient. Arnold told me there was insurance upon the property to the amount of \$500, but did not say in what company. The day the loan was closed up, Arnold brought Mrs. Henning and her husband to my office to close the loan. The policy was delivered to me by Arnold in the presence of Mrs. Henning, with the mortgage clause attached.”

Richman was attorney for Mrs. Funk at the time. There is no evidence that there was anything said by W. F. Henning or his wife, touching the ownership of the property, to the

defendant company or to anyone representing the defendant company at any time. There is no evidence that W. F. Henning said that he was the owner of the property absolutely, qualifiedly or otherwise. There is no evidence that he concealed from the defendant, or its representatives, the title to the property. There is no evidence of what occurred, or what was said at the time the policy in question was issued, touching the title to this property. It appears, however, that Lulu R. Henning was in fact the owner; that W. F. Henning was her husband that, as such, he had an insurable interest in the property; that the only interest, however, which he had in the property was the homestead right.

While there is no direct evidence of the fact, we think it cannot be disputed, under this record, that H. H. Arnold was the agent of the defendant company at the time this policy was issued, and at the time it was turned over to the plaintiff's attorney with the mortgage clause attached. At the time the policy was issued, it was countersigned by H. H. Arnold, as agent. At the time the mortgage clause was attached, his name appears as agent, immediately following the mortgage clause. At the time this trial was had he was dead. Lulu R. Henning also was dead. W. F. Henning was not a witness at the trial. It appears that he had left the country for parts unknown long prior to this trial. The only direct evidence appearing in the record, touching the relationship of Arnold to the defendant company, is the statement of the witness Richman that Mr. Arnold said to him:

“ ‘I am agent of the company that carries this insurance, and I will bring the policy to you later.’ The next day he brought the policy to me with the mortgage clause endorsed. This was the day the mortgage was executed or immediately after. The policy was delivered to me by Arnold.”

We feel that we are justified in saying that Arnold was the agent of the company in some capacity, either soliciting

agent or recording agent. Touching the question of Arnold's

2. INSURANCE:
condition of
title: knowl-
edge of com-
pany through
agent: suffi-
ciency of evi-
dence.

knowledge of the ownership of the property in question, the record discloses that the deed from W. F. Henning to Lulu R. Henning was dated August 2, 1902, and was duly filed for record in the office of recorder of deeds in the county on September 16, 1902; that the acknowledgment of this deed was taken before Arnold as notary public; that at the time this loan was made by the plaintiff to Mrs. Henning, and at the time the policy of insurance was delivered to her attorney with the mortgage clause attached, Arnold brought an abstract of the property and delivered it to plaintiff's attorney; that the abstract was continued by Arnold down to the date of its delivery to the plaintiff's attorney; that the continuation was in Arnold's handwriting; that the conveyance to Lulu R. Henning, as it appeared upon the abstract, was in the handwriting of H. H. Arnold. Arnold was the local agent for the defendant company, and was also the agent of Mrs. Henning in procuring this loan, and acted for her in securing the loan from the plaintiff, and knew that the insurance was demanded as additional security for the loan. The policy of insurance bears date of November 28, 1904. The property was destroyed by fire on the 9th day of February, 1908. A premium of \$9.00 was paid for the policy for the term of five years. The policy would expire on November 28, 1908.

Neither the plaintiff nor her attorney knew that the policy of insurance was in the name of W. F. Henning. Though delivered to plaintiff's attorney, it was not examined by him or her, further than to see that the mortgage clause was attached. Arnold was then acting for the company. He procured the mortgage clause to be attached to the policy, making the loss, if any, payable to the plaintiff as her interest might appear. While representing the company, he knew that plaintiff was taking this policy as additional security for her loan. He knew, at that time, that Lulu R. Henning was the owner of

the property. He must have known that the policy was made payable to her husband, and yet, though representing the company, he did not disclose this fact to the plaintiff. Plaintiff took it in good faith, believing that the policy thus delivered afforded her additional security for her loan, and did not learn of the objection now urged by the defendant to the policy until after the loss occurred.

It is a general rule that the knowledge of an agent of an insurance company as to all matters which come within the scope of his general employment is the knowledge of the company. Insurance companies, like other corporations, necessarily act through their agents. The agents are the eyes and ears of the company, through which it must receive information, if at all. Knowledge which comes through these avenues to the company is its knowledge. As a legal entity, the only information or knowledge it can acquire is through these agencies. As the knowledge of the agent is the knowledge of the company, it is bound thereby. There is no distinction in this state between soliciting and recording agencies. See Secs. 1749 and 1750 of the Code of 1897.

It is the misfortune of the company if it has a negligent or careless agent, and not the fault of the assured. If the agent of the company knows of facts which, at the inception of the contract of insurance, would render the security paid for of no avail to the insured, the company is bound by such knowledge, and if he fails to communicate this knowledge to the company, the insured, in the absence of fraud, ought not to be bound by such failure. Where a fact which would constitute a breach of a condition precedent to any liability of the company on the policy is fully known to its agent, local or general, who is authorized to consummate the contract of insurance, the agent's knowledge is the knowledge of the company, and his act in executing the policy as a valid completed contract is an exercise of the power of the company, and constitutes a waiver by it of such condition precedent, stopping the company from claiming a forfeiture for breach

of condition. See *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246 (17 Am. St. 233). See, also, *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. (Va.) 389 (26 Am. R. 364). In this last case it is said, quoting from *Bidwell v. Northwestern Ins. Co.*, 24 N. Y. 302:

“Indeed it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature) inserted in a policy intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts of which the company had full knowledge at the time of issuing the policy were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud. It would, as a legal principle, be equivalent to holding that a warranty of the soundness of a horse is a warranty that he has four legs, when one has been cut off.”

See also *Insurance Co. v. McDowell*, 50 Ill. 120 (99 Am. D. 497).

As has been said, the reason that notice to an agent is held notice to his principal is because it is the agent's duty to give the principal notice of the facts, and it will be presumed that he has done so. This is true whenever the notice is connected with the subject-matter of the agency. See *Jordan v. State Ins. Co.*, 64 Iowa 216, in which it is said:

“It has been determined by this court that an insurance company issuing a policy and receiving the premium thereon, with knowledge of facts which are breaches of the warranties by the assured, and of the conditions of the policy, will be

estopped to deny the validity of the instrument, and will be regarded as having waived the violated conditions."

W. F. Henning did have an insurable interest in this property. It was his homestead. True, he was not the sole and unconditional owner of the property. Can the company

avoid liability because of this condition of the policy, when, through its agent, it knew just what interest W. F. Henning had in the property insured? Even assuming that it was

3. INSURANCE:
"insurable" in-
terest: home-
stead in prop-
erty.

the purpose and intent of the company to issue the policy to W. F. Henning,—that he was the party intended to be insured by the policy,—that his interest in the property was the interest intended to be covered by the policy,—yet, through its agent, it consented to the mortgage and endorsed upon the policy so issued a provision consenting to the mortgage and providing that the loss should be payable to the mortgagee as her interest might appear. It knew, through its agent, at the time that it consented to this mortgage, and to the mortgage clause which was attached to its policy, that the plaintiff was accepting the policy, with the mortgage clause attached, for the purpose of additional security for the loan made, and said, "Permission is granted for encumbrance upon the real property *insured* in this policy, not to exceed the principal sum of \$550.00, and loss, if any, is made payable first to Kate D. Funk, mortgagee, as her interest may appear."

There was, in this mortgage clause, an affirmative assertion that the property was insured in the policy. True, it is said, "Subject to the conditions of the policy." The condition here invoked to defeat the policy is that W. F. Henning was not the sole and unconditional owner of the property. The fact is that he had a homestead interest in the property. The fact is that the company insured this interest to the amount of \$500. The fact is that the company knew, through its agent Arnold, that he had only a homestead

interest in the property. The company cannot, by inserting in the policy that it is at its inception void, because he is not the unconditional owner, accept the premium for the insurance, guarantee indemnity, and then say, "We knew that he was not the unconditional owner; we knew that the only insurable interest he had in the property was that of a homestead. We inserted in the policy a condition directly opposing the fact, as it was known to us at the time, and thereby we have defeated the policy." That is to say, "We issued you a policy, Mr. Henning; we received your money; we knew that the clause stated in the policy, in view of the facts which we then knew, made the policy absolutely void *eo instanti* upon its delivery; we took your premium, but we took no risk, and are not liable under it for the loss."

There is no evidence in this record as to the value of the homestead interest in the property. Under Sec. 1742 of the Code of 1897, the amount stated in the policy is prima-facie evidence of the insurable value of the property at the date of the policy. See *Wensel v. Insurance Assn.*, 129 Iowa 295. At the time the company issued its mortgage clause, it knew that the mortgage was executed by the party named in the policy of insurance, and his wife, Lulu R. Henning, and knew that Lulu R. was then the owner of the fee title; that the assured had only a homestead interest, and was not the unconditional and sole owner.

Upon this question, see *McMurray v. Capital Insurance Co.*, 87 Iowa 453. In this case, the policy contained a warranty that the insured was the unconditional owner of the property, when, in fact, he had only a contract for a deed. The company sought to defeat recovery upon the policy after loss because of this condition of the policy. It appeared, however, that the recording agent issued the policy with knowledge of the fact that the insured was not the sole and unconditional owner, and the company was held bound. See also *Carey v. Home Ins. Co.*, 97 Iowa 619. In that case, the court said: "Appellant, with knowledge, through its

agent, of the true state of the title of the insured property, and that it was not entirely unconditional and sole, issued this policy to the plaintiff, who had an insurable interest in the property." The property was in fact the homestead only of the plaintiff. There was a condition in the policy that it should be void if the interest of the assured was other than the entire, unconditional and sole ownership. The court said, citing *Lamb v. Ins. Co.*, 70 Iowa 238: "The defendant knew, when it issued the policy, that the assured did not own the fee simple title to the real estate, and it knew precisely what title he had, and, so knowing, issued the policy. If there was a false statement, the defendant so knew, and must be held to have waived the conditions of the policy in this respect." The court said, "This decision is decisive of the question under consideration." See also the following cases: *Fitchner v. Fidelity Mutual Fire Assn.*, 103 Iowa 276; *Gurnett v. Ins. Co.*, 124 Iowa 547, in which it is said: "The principle is well settled that when an insurance policy contains a condition which renders it void at its inception, and this is known to the insurer, it will be held to have waived such condition by receiving the premium and issuing its policy." See *Wensel v. Ins. Co.*, 129 Iowa 295; *Padrnos v. Ins. Co.*, 142 Iowa 199; *Kesler v. Ins. Assn.*, 160 Iowa 374; *Frame v. Ins. Co.*, 87 Iowa 288.

This disposes of the first two errors relied upon by appellant.

On the 21st day of November, 1906, prior to the destruction of the property by fire, plaintiff commenced a suit in the district court upon her note and mortgage, hereinbefore referred to, making W. F. Henning and the heirs of Lulu R. Henning, who had died in the meantime, parties defendant. There was no personal service of the notice of the commencement of this action, or of any proceedings thereunder served upon W. F. Henning, the assured. The notice to him was issued, but never served,

4. INSURANCE:
forfeiture:
foreclosure
"with knowl-
edge of in-
sured": serv-
ice by publica-
tion: strict
construction
of policy.

the sheriff certifying that he could not be found within the county. There was an affidavit filed in the case that he was a nonresident, and that personal service could not be made upon him. Notice thereupon was published as required by law, and this is the only notice, so far as the Hennings are concerned. There is a provision in the policy to this effect:

“If, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy, by virtue of any lien or encumbrance thereon, this policy shall be void.”

Defendant seeks to avoid the policy on this ground. It will be noted that the provision of the policy relied upon is that it shall be void in the event that foreclosure proceedings are commenced, or notice of sale given, with the knowledge of the insured. W. F. Henning was the insured. There was no personal service of any notice upon him in the suit. There is no evidence that he had any knowledge of the commencement of this suit. Defendant, having prepared this policy and these conditions upon which a right to forfeiture is predicated, must be held to have chosen the words advisedly, and must be held to have used the word “knowledge,” as distinguished from constructive notice, advisedly, with the intent to limit the right of forfeiture to those cases in which the insured had knowledge of the commencement of the foreclosure proceedings, or—what has been sometimes held equivalent—actual notice. That the word “knowledge” as used in the contract means actual knowledge, as distinguished from constructive knowledge or constructive notice, see *Fidelity & Casualty Co. v. Gate Natl. Bank*, 25 S. E. (Ga.) 392. That knowledge and notice are not synonymous or interchangeable, see *Words & Phrases*, Vol. 5, p. 3941.

Policies of insurance of this character are strictly construed against the company. If the company had intended by this provision to cover cases in which foreclosure proceedings were commenced without the knowledge of the

assured, in his absence, and without notice to him, they could have so said; but they limited the right of forfeiture to foreclosure commenced with the knowledge of the assured.

However that may be, we are not inclined to believe that it was the intention and purpose of this provision of the policy to defeat the policy in the event foreclosure proceed-

5. INSURANCE:
forfeiture
under mort-
gage foreclos-
ure clause:
consent to
mortgage:
effect.

ings were commenced upon a mortgage, to the giving of which the company consented after the issuance of the policy. The foreclosure proceedings did not have the effect of creating any new lien upon the property, but simply of establishing and confirming the lien to which the company had already consented. See 2 Pomeroy, Equity Jurisprudence (3d Ed.) Sec. 592. Upon this point, see *Fitzgibbons v. Ins. Co.*, 126 Iowa 52; see, also, *Greenlee v. Ins. Co.*, 102 Iowa 427.

It is next contended that, prior to the destruction of the property, there was a change of possession, in violation of the terms of the policy. On this point, the

6. INSURANCE:
forfeiture: pro-
hibited change
of possession:
tenant.

policy provides: "If any change *other than by death of the insured* takes place in the possession of the property covered by the policy, the policy shall be void."

It appears that W. F. Henning abandoned his wife some time prior to the loss,—just when is not shown. We assume from the record, which is very indefinite on this point, that W. F. Henning and his wife were in possession of this property at the time this policy was issued; that W. F. Henning abandoned his wife and left the country. When this occurred does not definitely appear. We assume that she remained in possession of the property up to the time of her death; that whatever change took place in the possession of the property was due to her death, and was made by those who represented the estate.

The allegations of the defendant are that Elmer Jen- nison was in possession of the property, pursuant to a sale

or contract of sale by the plaintiff. This fact is not shown in the record, nor have we any evidence upon which such a finding could be made. The only evidence that Jennison was ever in possession of the property is the fact that, in the foreclosure proceedings, notice was served upon him as tenant. At any rate, the evidence on this point is too meager to make a finding of fact upon which a forfeiture upon this provision of the policy could be sustained.

We find no error in the record, and the cause is—*Affirmed.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

E. L. HOSTETER, Appellee, v. WEAR-U-WELL SHOE COMPANY,
Appellant.

PRINCIPAL AND AGENT: Ostensible Authority of Agent—Facts

- 1 **Not Showing.** An agent has “ostensible authority” to do a certain act in the name of his principal when the conduct of the principal is such as to induce a third person to believe, in good faith, that the agent has been given authority to do such act. *Held*, such authority was not shown.

PRINCIPLE APPLIED: One Waters, as agent, had authority to enter into contracts with different people to sell on commission the goods of his principal. Neither he nor the person selling on commission had authority to bind the principal by a lease. Waters had authority simply to enter into the commission contracts and determine on the suitability of the location of the store building, the seller on commission being required to pay his own rent. Waters entered into a contract with Foster. Foster leased the building and signed the lease individually, and in the name of the principal. The landlord had no knowledge as to the agency powers or authority of Waters or Foster. *Held*, this condition furnished no sufficient basis to claim that either Waters or Foster had ostensible authority to bind the principal by a lease.

PRINCIPAL AND AGENT: Authorized Act of Agent—Ratification.

- 2 **Ratification** is the confirmation of a voidable act. One who knows that an unauthorized contract has been made in his name must promptly repudiate. Accepting the benefits of such unauthorized

contract will work a ratification. *Held*, ratification sufficiently shown.

CORPORATIONS: Agents—Unauthorized Acts—Power of President
3 **to Ratify—Presumption.** An officer of a corporation having authority to authorize the doing of a certain act may ratify such act when done without his authority, and a presumption prevails that the acts of the president of the corporation arising in the ordinary course of its business are authorized by the directing officers.

PRINCIPLE APPLIED: The president of an incorporated shoe company had general supervision of the establishment of agencies for the sale of the goods of the corporation. A lease of a store building was, without authority, signed in the name of his company. Later, knowledge of the unauthorized signing was brought to the president. He did not repudiate such act, but allowed the goods of the company to remain in the building for about a year after acquiring such knowledge. *Held*, it was sufficiently shown that the president had authority to ratify the unauthorized signing of the lease.

CONTRACTS: Misdescription of Parties—Contemporaneous, Mutual
4 **Construction.** The manner in which parties to a contract have mutually treated and regarded misdescriptions of the parties therein is very persuasive with the court.

PRINCIPLE APPLIED: A lease described the lessee as the "Wear-U-Well Shoe Company of Columbus, Ohio, with headquarters in Minneapolis, Minn." It was signed in the name of "Wear-U-Well Shoe Company." There was a company by the latter name at Columbus, Ohio, but it had nothing whatever to do with the lease in question. During the life of the lease, the defendant in this action never raised the question that it was not the party intended by the lease. Such defense was only suggested after suit brought. *Held* that the misdescription should be treated as surplusage.

Appeal from Black Hawk District Court.—HON. FRANKLIN C. PLATT, Judge.

SATURDAY, APRIL 10, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

ACTION for rent resulted in judgment as prayed. The defendant appeals.—*Affirmed.*

Reed & Tuthill, for appellee.

Sager, Sweet & Edwards, for appellant.

LADD, J.—On June 26, 1912, the plaintiff executed a lease of a storeroom owned by him in Waterloo for a term of 32 months beginning August 1st of that year, at a rental of \$50 per month. The lease recited that it was entered into by and between the plaintiff, as party of the first part, and “Wear-U-Well Shoe Company of Columbus, Ohio, with northwestern headquarters in Minneapolis, Minn., and F. H. Foster, local manager and agent for above Wear-U-Well Shoe Co. of the second part.” This lease was signed “Wear-U-Well Shoe Co. by F. H. Foster, Mgr. & Agt.” Foster also signed it individually. Though there was a company of the same name located at Columbus, Ohio, it had nothing directly or indirectly to do with the lease or its execution. The defendant is a corporation, bearing the name Wear-U-Well Shoe Company, of Minneapolis, Minn., and, during the time in question, was engaged in the business of selling shoes through branch agencies. It began business in April, 1912, operating under two plans: one by renting a storeroom, installing a stock of goods and selling through salesmen employed by it; and the other, by selecting a suitable location and employing an agent to sell the shoes on commission, he to “furnish room for said merchandise and give bond for the faithful discharge of his duties.” At the time the lease was executed, the defendant had abandoned the plan first mentioned and entered into the contract with Foster, under the terms of which he was to receive 15 per cent. of the proceeds of shoes of one class and 12 per cent of the proceeds of shoes of another class, and to pay the rent for the storeroom. Endorsed on the contract were the words: “Freight charges on first shipment and store completely built

to be paid by parties of first part, G. T. W. Jr." One Geo. T. Waters acted for defendant in selecting plaintiff's store-room as a suitable place at which to conduct the business, and for it entered into the contract with Foster under which the store was operated for several months. It was put in repair by plaintiff and occupied for the sale of defendant's shoes until August 30, 1913, when the stock was removed and this action to recover the rent for the month following begun.

Plaintiff made all reasonable efforts to rent to another but failed. The issues raised by the evidence are: (1) Whether Waters had ostensible authority to contract for the lease in defendant's behalf; (2) whether the defendant subsequently ratified the execution thereof; and (3) whether it was a lease to defendant.

I. The evidence that Waters, as well as Foster, was without actual authority to execute the lease is undisputed. Did he have ostensible authority—that is, was defendant's

conduct such as to induce plaintiff to rely on the existence of authority on Waters' part to represent defendant in executing the lease?

1. PRINCIPAL AND AGENT: ostensible authority of agent: facts not showing.

If the company held Waters out as having such authority or knowingly permitted him to so assume, then it must be held responsible; for to allow the principal to dispute the authority of the agent in such a case would enable him to commit a fraud on innocent persons dealing with him in reliance thereon. Whether there was such apparent authority, then, is to be determined not from the acts of the agent but from those of the principal. All defendant had done was to authorize Waters to enter into contracts with persons to handle defendant's goods on commission, and select a storeroom or suitable location to be furnished by such person at which he should carry on the business. Nothing else was done by defendant prior to the execution of the lease and even this much was not known to the plaintiff, for he was not advised that the local manager

was required to furnish the room or pay the rent. Manifestly, then, defendant was not guilty of clothing its agent with an apparent authority which was not accorded him, and there is no ground for saying that Waters had apparent authority to execute the lease.

II. The defendant advanced the first month's rent by sending in its check therefor payable to its local manager, Foster, and he endorsed it over to plaintiff. Thereafter, the

2. PRINCIPAL AND
AGENT: unau-
thorized act of
agent: ratifi-
cation.

rent was paid at the store. Goods consisting of shoes, rubbers, findings and fixtures were furnished by defendant and placed in the room for sale, with Foster as manager. He continued as such until September 30, 1912, at which time he was relieved and C. O. Barnes installed in his stead. In arranging this change, F. T. Dexter, the president of the defendant company, and Waters were at Waterloo, when the former's attention was directed to the lease and the manner of its execution. With reference thereto, he testified:

"Was quite surprised at its having been signed with our company name and told him he had no authority to sign our name to lease, and that he was the only one they were holding on it, and in making transfer from Foster to Barnes I told Foster that he would have to see Hosteter and arrange with him for subleasing to Barnes, and make his terms on the lease, as we weren't on the lease. Barnes succeeded Foster. Wear-U-Well Company entered into a written contract with Barnes. I believe I made that contract for the company. . . . Told Foster he was liable on lease. Told him to see Hosteter and arrange for transfer of lease to new man, Barnes, and that he himself was liable. Don't know whether he did this."

Foster testified:

"Don't remember whether I said anything about having signed, think we didn't. He (Dexter) looked the lease

over, my recollection is he said something to Waters, wanting to know why the lease was made out in that way. Don't remember the exact conversation. Waters said something about that was the only way they could get the room or something to that effect. They talked about the lease, I presume they were talking about it, but don't know whether they were or not. They talked some and looked over lease. Talked something about it, don't know what. They finally got Barnes to take the store."

Neither Foster nor anyone else advised plaintiff that defendant's name was attached to the lease without its authority, and with this knowledge on Dexter's part, together with that of the fact that plaintiff had refused to lease to other than the owner of the stock to be installed, he, in behalf of the defendant, entered into a contract with Barnes like that with Foster, and the occupancy of the premises by its goods was continued under the same lease. Barnes was succeeded by W. J. Roth, under a like contract, November 4, 1912, and the latter by Wm. Tiep, June 5, 1913. The goods of the company continued on the premises in charge of its sales agents for nearly a year after it acquired knowledge through its president of the execution of the lease by its agent, and by accepting the advantages of said lease, it ratified the act of its agent in attaching its name thereto. Had it repudiated such act promptly by notifying plaintiff that it would not be bound thereby, or had it ceased to occupy the room with its goods, it must have been relieved of all liability. As contended by appellant, knowledge of all the material facts connected with the making of the lease was essential to an effective ratification. *Haswell v. Strandring*, 152 Iowa 291.

As seen, such knowledge was obtained by the company through its president. Was this while he was acting within the scope of his duties? He testified that Waters was an "installing agent. We sent him out to secure agents for

us and to arrange with them to handle our goods. He was the one to judge the location and determine whether the location was satisfactory. He looked up agent's financial standing. I gave him list of towns. Waters was under my supervision and reported direct to me as president of the company. I passed upon matters he reported to me. Waters would determine in what part of a town an agency would be located. He looked over the ground and store and saw to the installing of stock and so on; he passed on that matter himself. He had full authority to do it. . . . I told him what his duties were. The question of his making leases never came up." The locating of the different stores being under his supervision, the manner of so doing impliedly was subject to his direction; and as he might authorize leasing in the first instance, the power to ratify an unauthorized lease made by an agent was likewise within the scope of his authority. See *Merrick v. Plank Road Co.*, 11 Iowa 74; 1 Clark & Skyle's Agency, Secs. 119, 120.

It is elementary that a person or corporation capable of entering into a particular contract in the first place may ratify such contract, if still capable, where it has been entered into by another without authority.

3. CORPORATIONS:
agents: unau-
thorized acts:
power of pres-
ident to rat-
ify: presump-
tion.

"Any officer or agent of a corporation may give validity to the unauthorized acts of his subordinates, provided they be of a kind which he might have authorized them to perform." Purdy's Beach on Priv. Corp. Sec. 777.

In the latter work, it is said, in Sec. 779:

"*Knowledge*, by the corporation, of all the material facts and terms of the unauthorized contract, is essential to show, in attempt to hold that the corporation impliedly ratified it, but acquiescence implies such knowledge. If a person assuming to act as agent of a corporation, but without legal authority, or an agent in excess of his proper authority, make a contract, and the corporation knowingly receive and retain

the benefit of it, this will be a ratification of the contract and render the corporation liable as a party to it. The rule does not apply unless the corporation itself received the money or property, or appropriated it under corporate agency."

There was no direct evidence bearing on the authority of the president, save as recited above, which disclosed that he was in the active management of the affairs of the company in establishing branch stores, and that, in pursuance of the arrangements of its agent, Waters, under his supervision, stocks were placed and the business carried on by the company. This, in connection with the presumption that the acts of the president of a corporation arising in the ordinary course of its business are authorized by the directing officers, was quite enough to warrant the conclusion of the trial court that Dexter, as president of the defendant corporation, was endowed with power to lease the premises originally or to ratify the leasing thereof by Waters and Foster. See *White v. The Elgin Creamery Co.*, 108 Iowa 522; *Ney v. Eastern Iowa Tel. Co.*, 162 Iowa 525.

III. But counsel for appellant urge that the lease did not purport to be that of defendant. The name designated in the first paragraph of such instrument is precisely the same as that attached thereto, save that it is described as "of Columbus, Ohio, with north-western headquarters in Minneapolis." That this was a mere mistake of location appears from the recital following: "And F. H. Foster, local manager and agent for above Wear-U-Well Shoe Co." He had been appointed such manager for defendant. Moreover, Dexter, as president, when shown the lease, raised no objection on this ground, merely suggesting that the defendant's name had been signed thereto without authority. In these circumstances, the matter of location of the company was rightly treated as surplusage and the defendant, as its name

4. CONTRACTS :
misdescription
of parties :
contemporane-
ous, mutual
construction.

had been signed to the lease, regarded as the lessee intended. *Montanye v. Wallahan*, 84 Ill. 355. See *Schulte v. Schering*, 26 Pac. (Wash.) 78. With full knowledge of its terms and that plaintiff understood it to be occupying the premises as tenant, the defendant proceeded as though it was such, in so far as plaintiff was advised, and having acquiesced in the assumed authority of Waters and Foster in negotiating and executing the lease in its name and having received the benefits accruing therefrom, it cannot be heard to deny the obligation of the instrument so fully ratified, and the court rightly directed the jury to return a verdict for plaintiff. Some rulings on the admissibility of the evidence are complained of, but these were either correct or such that, had they been different, the same conclusion must have been reached.—*Affirmed.*

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

A. W. MILLER, Appellant, v. W. J. BRYSON et al., Appellees.

JUSTICES OF THE PEACE: Appeal—Failure to Docket—Affirmance

- 1 on Appellee's Motion—When Erroneous. Appellee has no right, on appellant's appeal from a judgment of a justice of the peace, to pay the docket fee and to have an affirmance in the district court unless appellant has been delinquent in two particulars, viz., (a) failure to docket the cause by noon of the second day of the term and (b) failure to pay the docket fee. (Sec. 4559, Code.)

PRINCIPLE APPLIED: Defendant, through his attorneys, duly perfected an appeal from justice court. These attorneys had an arrangement with the clerk of the court by which the clerk docketed all causes filed and appeals taken by these attorneys, and charged the amount of the filing fee to said attorneys. The clerk failed to notice that the appeal in question was taken by these attorneys. Result, the appeal was not docketed. The clerk would have docketed the appeal had he noticed that it was taken by these attorneys. Appellee paid the fee, docketed the cause, and secured an order of affirmance. Appellant was not negligent in discovering the non-docketing of the appeal and made proper showing of meritorious defense. *Held*, the appellant was not de-

linquent, because the clerk had waived payment of the fee in advance and the affirmance was properly set aside on motion filed 30 days after the affirmance and before the order had been signed.

COURTS: Control over Record—Appeal from Justice of the Peace—

- 2 Setting Aside Affirmance.** A judgment, entered under a misapprehension of facts upon which the right to enter any judgment exists, may be set aside by the court at any time during the term at which it is made and before it is signed by the judge. (Sec. 243, Code.)

Appeal from Clinton District Court.—HON. A. P. BARKER,
Judge.

FRIDAY, MAY 14, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

THIS appeal brings up for review the action of the district court in setting aside an affirmance of judgment in justice court made under and by virtue of the provisions of Sec. 4559 of the Code of 1897, the motion to set aside the judgment of affirmance having been filed after the time fixed in said statute for filing such motion.—*Affirmed.*

E. L. Miller and Skinner & Coe, for appellant.

Ellis & McCoy and Oakes & Oakes, for appellees.

GAYNOR, J.—This was an action commenced before a justice of the peace and appealed. The cause was tried on the 18th day of August, 1913. Judgment was entered for the plaintiff. The defendant gave notice of appeal to the district court, filing a bond as required by law. The notice was served on the 4th day of September, 1913, and was signed by Oakes & Oakes, J. E. Purcell, and F. W. Ellis, attorneys for the defendants, and within the time limited for the taking of appeals. Upon taking the appeal, the justice made a transcript of the proceedings and sent them by mail to the clerk of the district court. The clerk received the same but failed to docket the case. On the 12th day of November, 1913,

the plaintiff appeared, by his attorney, E. L. Miller, had said case docketed, paid the docket fee, and on motion had the judgment of the justice affirmed. Under the statute, the case should have been docketed by the defendants, and the docket fee paid before noon of the second day of the November term. On the 11th day of December, the defendant, W. J. Bryson, appeared and filed a motion, supported by affidavits, praying that the judgment of affirmance be set aside. The motion is as follows:

“1. That there was a waiver by attorney for plaintiff of the docketing of said case by noon of the November term, 1913, of said court.

“2. That there was a waiver of the payment of the docket fee in said case by said plaintiff's attorneys.

“3. That under the understanding existing between Ellis & McCoy, attorneys, and J. H. Edens, clerk of said court, docket fees in cases where said Ellis & McCoy are interested as attorneys are not required to be paid in cash, but are charged by the said clerk.”

Thereafter, and on the 15th day of December, 1913, defendants filed an amendment to their motion, setting forth that the judgment was rendered by accident, mistake, or unavoidable casualty. In support of this motion, the defendant filed the affidavit of his attorney, F. W. Ellis, from which we gather the following facts:

That F. W. Ellis, through one J. E. Purcell, an attorney at law, requested the justice of the peace to make a transcript in said cause, and to forward the same to the clerk of the district court; that thereafter, said transcript was made by said justice and duly forwarded to and received by the clerk; that it had been arranged between said clerk and the firm of Ellis & McCoy, of which firm F. W. Ellis was a member, that in all cases coming to said court in which fees were required to be paid, the clerk would file or docket the same and charge the docket fee to said firm; that said attorney understood that, under this arrangement, the clerk would not

require the payment *in advance* of the docket fee, before docketing the case; that during the first days of the September term, the affiant conversed with the attorney for the plaintiff; that the attorney asked the affiant whether he was employed in the case, and affiant answered that he was employed to take an appeal, meaning and intending thereby that he was employed to prosecute the appeal and try the case in the district court. He supposed Miller so understood it; that during said September term, he had a further talk with plaintiff's attorney concerning the trial of said cause, which conversation was substantially as follows: Plaintiff's attorney requested of this affiant that said case be tried during the September term. This affiant answered that he was not certain that it could be so tried, but that it probably could if the attorneys could agree upon a time that would be convenient to them; but that, in any event, it would be tried at the November term. Plaintiff's attorney said he was anxious to have the case disposed of. In this conversation, affiant believed and understood that the case had been docketed and would be tried at the November term when reached, unless by agreement it could be taken up earlier; that, believing that said cause had been docketed, he took no further steps to have the same put upon the docket or to pay the fee; that this affiant had no knowledge of the entry of affirmance until about the third or fourth day of December. During all the time, affiant believed that the case had been docketed and the docket fee charged to his firm; that, on account of the conversation with plaintiff's attorney, he was lulled into security and led away from ascertaining the true facts as to whether the case had been docketed for the November term; that if plaintiff had known that said case had not been docketed and the fee charged as aforesaid, he would have ascertained the fact before noon of the second day of the November term, and would have had said case docketed under the arrangement between his firm and the clerk as to the payment of the fee.

In support of the motion to set aside the judgment of affirmance, in addition to the affidavit of Ellis, the defendant filed the affidavit of the clerk of the district court, as follows:

“I, J. H. Edens, being first duly sworn on oath state that I am clerk of the district court in and for Clinton county, Iowa; that the transcript from the justice court of Wm. O’Connell, a justice of the peace of Clinton county, Iowa, in the above entitled case, was sent me by said justice by mail; that I did not read said transcript when the same was sent me and that the notice of appeal attached thereto was not on the outside of said transcript, but is the fifth page thereof, and had I observed or noticed the name of F. W. Ellis as one of the attorneys for the defendants therein named, I should have docketed said case and charged the firm of Ellis & McCoy with docket fee immediately upon receipt of said transcript or shortly thereafter; that said firm of Ellis & McCoy have credit with me as clerk of the court for docket fees, and do not pay such docket fees when cases are filed by them, whether of appeal or otherwise, at the time of filing, but such docket fees are charged in my books against the firm of Ellis & McCoy, and said firm of Ellis & McCoy and said F. W. Ellis had the right to rely upon such understanding in docketing cases, whether of appeal from justice court or otherwise.”

In addition to these affidavits, the defendant filed certain other affidavits tending to show a meritorious defense. There was no showing made contrary to what is herein set out.

This motion of defendants to set aside the affirmance was sustained, and an order entered cancelling and setting aside the judgment. From this ruling, the plaintiff appeals.

1. JUSTICE OF
THE PEACE:
appeal: fail-
ure to docket:
affirmance on
appellee's mo-
tion: when
erroneous.

Sec. 4559 of the Code provides:

“If the appellant fails to pay the docket fee and have the case docketed by noon of the second day of the term at

which the appeal should properly come on for trial, unless time is extended by the court, the appellee may do so, and have the judgment below affirmed. . . . If the appellant, before noon of the next day after the order of affirmance has been granted, shall appear and make a sufficient showing of merits and proper excuse for his default, and pay to the clerk the docket fee, the court in its discretion may set aside the order of affirmance, and the cause shall stand for trial at that term, unless appellee asks for a continuance.”

Under a strict construction of this statute, the defendant's motion came too late to avail him anything. If the showing was that the appellant failed to have the case docketed and pay the docket fee, as required by this statute, he could have no relief from the affirmance of the judgment based on such failure, unless the motion was filed and the showing made as therein contemplated. The evident object and purpose of this statute is to prevent unnecessary delay in the disposition of cases appealed from the justice courts, and this is the thought underlying all the statutes regulating such appeals. Sec. 4548 provides that the appeal must be perfected within twenty days from the rendition of the judgment. Sec. 4555 provides that, upon an appeal being perfected, the justice shall file in the office of the clerk of the court to which the appeal is taken all the original papers relating to the action, with a transcript of all the entries in his docket. Sec. 4558 provides: “If an appeal is *perfected* ten days before the next term of the court to which it is taken, the justice's return must be made at least five days before that term. All such cases must be tried when reached, unless continued for cause.”

To entitle the appellee to have the judgment affirmed for a failure to comply with Sec. 4559 of the Code, it must affirmatively appear that the appellant is in default in *both particulars*, to wit, a failure to have the case docketed by noon of the second day of the term at which the appeal

should properly come for trial, and a failure to pay the docket fee. A failure to have the cause docketed is not sufficient to justify an affirmance. It must further appear that the docket fee is not paid. In *Vasey v. Parker*, 118 Iowa, at page 617, this court said: "We find that appellee may have the judgment affirmed when, and only when, the appellant fails to pay the docket fee and have the case docketed. Unless appellant is in default in both particulars named, there is no right to an affirmance. . . . The clerk is not required to docket any appeal without being paid the fee which the law exacts for such services, but if he concludes to *waive the fee*, and places the case on the docket for trial, there does not seem to be any authority for dismissing it because the fee was not paid." It therefore follows that if the docketing fee is paid to the clerk, and the case is not actually docketed, the appellee has no right to an affirmance. If the case is actually docketed, without the payment of the filing fee, the appellee has no right to have the case affirmed.

Under the arrangements made between the clerk and attorney for appellant, the appellant was not under obligation to pay the fee to the clerk before the docketing of the case. The clerk, as shown by his own affidavit, had stipulated and agreed with appellant's counsel to file all papers in which appellant's attorney appeared as counsel without the payment of the filing fee before or at the time of filing. This was, on the part of the clerk, a waiver of the right which he had to exact payment of fees before filing. Therefore, in contemplation of law under this arrangement, the fee had actually been paid, or had actually been arranged for, before the receipt of the transcript by the clerk. All the clerk had to do, then, was to enter it upon the docket. He says, "Ellis & McCoy have credit with me, as clerk of the court, for docket fees, and do not pay such docket fees when cases are filed by them, whether of appeal or otherwise, at the time of the filing, but such docket fees are charged in my books against the firm of

Ellis & McCoy, and said F. W. Ellis had the right to rely upon such understanding in docketing cases."

We must, then, hold that the clerk had waived the statutory right to exact the fee before performing the act of docketing. The docketing was the act of the clerk—an omission on the part of the clerk for which appellant was in no way responsible. The papers showed that Ellis appeared as attorney for appellant. The clerk overlooked that fact, otherwise he said he would have docketed the case at once and charged the docket fee to Ellis & McCoy.

This being true, it presents a case such as this: The appellant causes the transcript of proceedings in the justice court to be filed with the clerk; pays or arranges for the clerk's fees; either pays or the clerk waives his right to have the fee advanced. Thereafter, the clerk neglects to enter it upon the docket. The appellee, not finding it upon the docket, tenders to the clerk the fee for docketing and demands that the case be docketed, and thereafter has the case affirmed under the provisions of Sec. 4559. One element, therefore, of his right to have it affirmed is lacking. The fee had been paid in contemplation of law, and, for the purposes of the case, either paid or the payment in advance had been waived by the clerk, and the failure to docket, in and of itself, was not enough to entitle the appellee to have the case affirmed.

The motion to set aside the affirmance was filed during the term at which the judgment of affirmance was entered. It was filed before the record had been signed by the judge.

This brings the case under the rule laid down in Sec. 243 of the Code, in which it is said, in substance: "The record of the district court is under control of the court, and may be amended or any entry therein expunged at any time during the term at which it is made, or before it is signed by the judge."

This covers a case where the judgment is improvidently

2. Courts: control over record: appeal from justice of the peace: setting aside affirmance.

entered,—where the judge, under a misapprehension of facts, entered a judgment that he had no authority to enter and would not have entered had he known that the fact did not exist upon which he predicated his authority to enter the judgment. When the judgment is so improvidently entered, he may expunge it from the record. By this we do not mean to be understood as saying that a misapprehension of a fact which inheres in the judgment itself is a ground for annulling the judgment previously entered, but that a misapprehension of a fact upon which the right to enter any judgment exists is such ground. The judge, upon ascertaining the nonexistence of the fact, may expunge the judgment from the record during the term, and before the record is signed.

It is not claimed in this case that either the appellant or his attorney was in any way negligent or lacked, in the least degree, the exercise of proper diligence in respect to the matters involved here. Nor does it appear from this record that there was any fraud practiced by the attorney for the appellee. It seems to have been an all-around misapprehension and misunderstanding of the fact as it actually existed that led all parties into the error which provoked this controversy.

Courts favor trials upon the merits, and are not disposed to defeat a full investigation of the rights of the parties by any nice technical ruling, unless forced to by the plain provisions of the statute.

While there is no fraud in this case, any other holding than we make here would open the door to fraud, and this the courts strenuously guard against. Under the whole record, we think the case ought to be affirmed.—*Affirmed.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

E. H. SPRATT, Appellee, v. M. DWYER, Appellant.

PARTNERSHIP: Settlement of Accounts—Conclusiveness. A settlement between partners of partnership accounts, without fraud or mistake, is a finality, especially when such settlement has been ratified and affirmed by the conduct of the parties.

Appeal from Iowa District Court.—HON. R. P. HOWELL,
Judge.

MONDAY, MARCH 22, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

ACTION for an accounting. Plea of settlement. Decree for the plaintiff. Defendant appeals.—*Reversed and Remanded.*

B. F. Swisher and Ranck & Bradley, for appellee.

W. E. Wallace and Wade, Dutcher & Davis, for appellant.

GAYNOR, J.—This is an action for an accounting and to set aside certain deeds made by plaintiff to defendant.

The plaintiff alleges in his petition substantially as follows: On or about the 1st day of February, 1904, plaintiff and defendant entered into a partnership in the business of buying and selling horses, mules, cattle, sheep and hogs, and buying and selling land, buying and harvesting hay and grain of various kinds, and other matters pertaining to the business of farming and stock raising, and continued to conduct said business as partners until the month of October, 1908; the agreement of partnership was oral, and the understanding was that each should share equally in the profits and losses,

after deducting the expenses and cost of conducting the business; either party loaning money to the partnership should receive 8 per cent. interest per annum thereon, during the time the partnership used such money; many transactions were had during that period under the firm name of Spratt & Dwyer. During the time said partnership continued, the business was conducted and practically all the stock handled by the plaintiff. The same was purchased by him, cared for, fed, sold and traded, or disposed of, under his direction. All the stock bought by said partnership was purchased by the plaintiff and sold or traded by him personally, with the exception of two public sales in the years of 1904 and 1905. During the term of said partnership, the defendant was engaged in the banking business. All the stock, grain, etc., bought by the plaintiff was paid for at the time of purchase by checks drawn by the plaintiff on the Parnell Savings Bank, and signed by the plaintiff individually. This was done in pursuance of an oral agreement between the parties. During all the time said business was conducted, all money received by the plaintiff herein for stock, grain, and other partnership property which he sold was turned over by the plaintiff to the defendant, and all notes and mortgages taken by the plaintiff for said firm, in payment for property sold by him, were turned over to the defendant. Many of the notes were made payable to the firm of Spratt & Dwyer. During the existence of said partnership, almost entirely through the efforts and work of the plaintiff herein in buying and feeding and selling stock, and buying, harvesting and selling grain, a large amount of money was made by said firm. The profits from buying and selling horses and mules were about \$6,000; from buying, selling and feeding cattle, about \$8,000; and from buying, selling and feeding hogs and sheep, about \$5,000. There was a profit on the sale of land of about \$700. The profits or earnings of said partnership, during said period, were about \$20,000. The plaintiff received, during the time said partnership business was conducted, about the sum of \$3,000, which he used for the

purpose of making improvements upon his land and paying interest charges. During the time said business was conducted, the defendant induced the plaintiff, by cunning, false and fraudulent statements and representations regarding the accounts of said firm and the interest and standing of said business, with reference to the partnership business, to sign certain notes which were made payable to the defendant, and which were taken and held by him. The notes were secured without any real consideration. At the time these notes were given, the defendant promised that, if it was discovered that these notes or any of them were incorrect, either as to the amount or number, they should be corrected. On May 7, 1908, the defendant secured from the plaintiff a certain promissory note, signed by plaintiff, for the sum of \$8,648.53, payable to the defendant. This note was secured by means of statements and representations that the note would be used for the purpose of raising money to be invested in Colorado and Dakota land, from which it was claimed a large profit would be derived. After defendant had secured said note, the plaintiff went to Dakota to purchase land and purchased land in Lyman county under a contract, and paid thereon the sum of \$500. Defendant then refused to permit any further payments to be made upon the land, and refused to carry out the proposition to invest the money secured by means of said note, and told the plaintiff that he (the plaintiff) was indebted to the defendant in that sum, and said that the indebtedness was evidenced by various other notes which the defendant had secured from the plaintiff, as hereinbefore stated. Thereafter, in the fall of 1908, the defendant, by intimidation and false statements and threats, induced, frightened and coerced the plaintiff into executing a warranty deed to certain land owned by the plaintiff, the consideration named in the deed being \$23,705. Said land was, at the time, reasonably worth on the market \$30,000, and the encumbrance at the time was \$12,500; so the plaintiff's equity therein was \$17,500. The plaintiff alleges that he believes that the amount he is

entitled to as his portion of the profits and earnings of said partnership business, during the time said firm was engaged in business, and for the rent of the land and for his services during said period of time would equal the sum of \$15,000, and he therefore desires an accounting, and prays that an accounting be had to determine the amount due him from the partnership, and that he have judgment for \$15,000, and a decree setting aside the deeds executed by him to the defendant.

The defendant admits that, on or about the 1st day of March, 1904, he entered into an oral agreement with the plaintiff, whereby he agreed to furnish the plaintiff money for the purpose of buying two or three carloads of cattle, and that he was to receive, as compensation therefor, interest at the rate of 8 per cent. per annum upon the money so advanced, the cattle to be handled and sold by the plaintiff for the benefit of plaintiff and defendant; that they were to share equally in the profits of said transaction. Defendant admits that plaintiff continued to purchase cattle, horses, mules, hogs and sheep until May, 1908, and to sell the same for the account of said parties, but that no further or other agreement, with reference to said business, was made by the parties. Admits that all the stock handled by said partnership was purchased and disposed of by the plaintiff. Admits that, during the time said partnership continued, most of the stock bought by the plaintiff for said firm was paid for by checks drawn by the plaintiff on the Parnell Savings Bank and signed by the plaintiff individually, under an oral agreement between the parties that this method of business should be pursued. Defendant admits that, on the 27th day of May, 1908, the plaintiff executed and delivered to him his promissory note for \$8,648.53, due one year after date, but denies that the same was obtained by any fraud or by any fraudulent means. He admits that, on September 30, 1908, the plaintiff conveyed to defendant certain real estate, but denies all alleged fraud in connection therewith. Defendant denies each and every other

allegation, and especially denies that he has, at any time, made any fraudulent representations to the plaintiff, or deceived the plaintiff or practiced any fraud upon him whatsoever, and denies that he is indebted to the plaintiff.

The defendant, for a separate defense, alleges that, on the 27th day of May, 1908, a full settlement of all matters involved in this action and all transactions between the parties was had and that, in pursuance of said settlement, and to cover the balance which was mutually agreed upon between the said parties as the amount due from the plaintiff to the defendant, the plaintiff made and executed to the defendant the said note of \$8,648.53, and executed to defendant a certain mortgage to secure the same; that said note so given was, on the 30th day of September, 1908, fully paid by the plaintiff. Defendant says that said settlement was a partial settlement only, in that it involved only such transactions as occurred prior to the time of entering into the same, and defendant says that, by reason of said settlement, plaintiff is not entitled to an accounting as to any transaction between them which was prior to the making of said settlement; that plaintiff acquiesced in said settlement and is estopped from disputing it. Defendant further says that subsequent to said settlement, to wit, May 27, 1908, no business has been transacted by the firm, except the winding up of the transactions between the plaintiff and defendant after said date; that the partnership was dissolved on that date; that since the said settlement, defendant has received, of moneys belonging to the firm, of which the plaintiff is entitled to receive one-half, the sum of \$3,734.36, and alleges that he has paid out, on accounts of said firm, as an offset against said amount received, the sum of \$3,293.75, from which it would appear that a balance is due the plaintiff on this admission; but to this defendant pleads a setoff, to which attention will be hereinafter called.

The plaintiff for reply denies that the settlement claimed by defendant was a full settlement of all matters involved in this action and of all transactions between the plaintiff and

defendant. Denies that the settlement was mutually agreed to, and denies that he acknowledged that he owed the defendant the amount named in the note which defendant secured from the plaintiff and which plaintiff secured by a mortgage, but alleges the fact to be that, at the time of the alleged settlement, plaintiff denied that he owed the defendant the amount claimed and remonstrated against giving the note which defendant secured; that many of the notes which defendant held, which were computed by defendant in arriving at the aggregate amount for which the note was given, \$8,648.53, were fraudulent and secured from the plaintiff by means of misrepresentations and trickery, and that said settlement and said note were given against his will, under threats made by the defendant. Plaintiff further alleges that, at the time said settlement was made, the defendant agreed with the plaintiff that if it was afterwards found that any mistakes were made, or errors existed, or that there was anything wrong with the computation or figures or in making said settlement, he would make the same right, and would pay to the plaintiff what he found he was entitled to, cancel said mortgage, and return said note. Plaintiff further alleges that the contract and agreement made by him with the defendant, by which he agreed to sell certain land to the defendant, were afterwards consummated by the execution of deeds by him to the defendant, but these deeds and the contracts were also obtained by false representations and false statements, and by means of power and influence exercised over the plaintiff by the defendant, and by reason of duress and undue influence, and alleges that whatever settlement was made between the parties was obtained by the defendant fraudulently; that plaintiff never agreed to the thing.

Upon the issues thus tendered, the cause was tried to the court, and a judgment and decree entered for the plaintiff against the defendant for the sum of \$4,137.14, with interest thereon at six per cent. from May 23, 1910, and the costs of the action. No accounting was made between the parties as

a basis for such finding, nor was there any finding by the court in the record as to whether there was or was not a settlement between the parties. We assume, however, that the court found adversely to the defendant on the question of settlement. The question of settlement stands at the threshold, and challenges our attention first.

If the record discloses that the parties entered into a settlement of all matters existing between them on May 27, 1908, and that, in consummation of such settlement, the

PARTNERSHIP:
settlement of
accounts: con-
clusiveness.

plaintiff executed and delivered to the defendant the note for \$8,648.53 and secured the same by mortgage, and thereafter conveyed to the plaintiff certain real estate in satisfaction of the note and mortgage so delivered; that the land at the time was encumbered by mortgages given by the plaintiff; that the defendant surrendered the note given in settlement to the plaintiff, cancelled the mortgage, and surrendered to the plaintiff the notes held by him against the plaintiff, which entered into the consideration of this note for \$8,648.53, and has since then paid off the encumbrance upon the land deeded, it will not be necessary for us to enter into any accounting between the parties prior to the date of said settlement. A settlement is a contract. When mutually entered into between both parties, without fraud or mistake, it is as binding as any other contract, especially where it has been acquiesced in by both parties subsequent to the making of the settlement.

That there was a general settlement made between the parties of all the matters existing between them prior to the 27th day of May, 1908, there can be no question under this record. Plaintiff, however, claims that it was procured by fraud and misrepresentation and coercion, and by reason of the influence which the defendant exercised over him at the time. Plaintiff further contends that, at the time of the execution of some of the instruments involved in the consummation of the settlement, he was under the influence of intoxicating liquors to such an extent that he was not capable of

transacting business. These are all matters of fact to be determined from an examination of the record.

It appears from this record that these parties commenced business together about the 1st of February, 1904; that the business consisted in buying and selling live stock of all kinds and other business; that the plaintiff herein did all the buying and selling, and used his own judgment as to when and what to buy and when and what to sell, and fixed the price in each instance; that in the buying and selling and handling of this property, expenses were incurred, both great and small; that the plaintiff undertook to deliver to the defendant the proceeds of all sales made by him. He was not required to account to the defendant, nor to furnish the defendant an itemized statement at any time as to what the property cost, the expenses incurred in caring for it or the amount received upon the sale, and did not. He paid to the defendant, when he did pay to the defendant, only such sum as he considered to be the amount realized from the sale. Plaintiff kept no books concerning his transactions outside. The defendant claims to have kept an accurate account of all moneys received by him from the plaintiff. It appears that an account was kept at the bank in plaintiff's name. Upon this account, plaintiff checked at will, drew checks to pay personal expenses as well as the expenses of the firm; and whenever there was need of money to keep this account good, it was put into the bank by the defendant. Defendant kept an account of this, or claimed to. This method of doing business continued until the winter or spring of 1908, at which time the defendant called for a settlement of their accounts. They agreed upon one Van Ness, who was the bookkeeper for the defendant in defendant's lumber business. Each party brought in all his books, accounts and papers relating to the firm transactions. This was along in the winter of 1908. Van Ness figured their accounts from the data given him by both parties and subsequently struck a balance, from which it appeared that in the

partnership business, the plaintiff was indebted to the defendant in the sum of \$720.

Plaintiff says in his testimony:

“When I gave this note, I understood it was for that much money Dwyer had put in more than I in the business, and it was given for the figures Van Ness had arrived at, after he had figured up both our accounts, and after I gave the note, I found that I had paid some checks on the Kansas City cattle that I had not been given credit for, and I found there was an error in our settlement to that amount. He gave me credit for this.” He says: “I was told to bring in my books and checks early in the winter of 1908, so they could be figured. This was in January, 1908, or December, 1907.”

He further said:

“We were always talking about checking up and talking of where we were at, but never got to it until 1908. The first thing I knew about this settlement about to be made, I came into the lumber office and saw a lot of Dwyer’s checks and asked Van Ness what he was doing. I asked him if he was figuring Dwyer’s side of the business. He then asked me if Dwyer told me he was going to do it. I told him he had. When he got his side figured, he told me that he had the thing pretty well figured, and for me to fetch in my books. I used to go into the lumber yard about every day after that. I dropped in and asked Van Ness how he was coming along. He kept figuring along until something came up he didn’t know how it went, and I told him what I thought. Sometimes Dwyer came in and told him. So one evening he said he had finished.”

It appears that that time was soon after the note for \$720 was given.

Plaintiff further testifies:

“Q. You took in all the checks you had so far as you know? A. Yes, sir. Q. You took in everything you had

that bore on this partnership so far as you know? A. Yes, sir."

At another place in his testimony he said:

"Q. By the way, you had turned in your checks and things into Van Ness to be figured? A. Yes, sir, all the truck I had. Q. You had taken in these checks that you had? A. I took everything I had in the business and turned it over to him. Q. What did you do that for? A. He wanted me to bring them, show what knowledge I had, show what I had, and what books I had. Q. Did he tell you what for? A. Figure them. Q. He told you he was checking up this account with a view of making a settlement? A. Yes, sir. He wanted me to bring in my books and checks and everything I had bearing upon the account, and I did so. I went in where Van Ness was figuring the account day after day and talked to him every day."

Van Ness testified in substance:

"I first started on the Spratt & Dwyer account in the winter of 1907 and 1908. My first conversation was with Dwyer about figuring the account. After that I talked with Spratt. He and Dwyer were talking about a settlement. They both wanted a settlement. Spratt said, 'We will have to get some good man to figure these books and pay him for it.' They suggested different names. Mr. Spratt turned to me and asked me if I would have time to figure the account. I told him if it was satisfactory, I would try to do it. He said he would as soon trust me as anybody. I told him to bring his books and papers pertaining to the partnership account. He brought them in. I did most of the figuring up to April 4, 1908, at the lumber office. I think I did all of it at the lumber office. Both parties were present and discussed the accounts. I figured up the partnership account. Then I discovered an error, which, with interest and all, figured \$20.92. This was then taken into account. Other

items were brought in and the account changed to meet the conditions as they were placed before me by the parties."

He then proceeds with a detailed account as to how the settlement was made, from which it appears that each party took an active part in the settlement. Sometime after this April settlement, he says Spratt came to him and told him the settlement was wrong. "He said that he did not have credit for the Kansas cattle, so I took the books and went out to Dwyer's house. I was some time there, straightening the discrepancy." He says there was no claim made by Spratt between the settlement of April 4th and May 27th that he had not received the amount or the items which he had been charged with having received in the April settlement. Nor was there any claim made that he had put in the business more than he had been given credit for, except he thought he ought to be allowed more for groceries in the haymarketing season. At the May 27th settlement, the April 4th settlement stood, with the corrections as made, and in addition, there were taken into account thirty notes in all which Spratt owed to Dwyer personally. "The notes were all in my possession on the 26th of May, 1908, and I figured them over that day. Spratt and Dwyer were both present. Dwyer handed me the notes to figure, and made a list of them. Spratt was standing by and the notes were lying on my desk. It was at the end of this settlement that the note for \$8,648.53 was given, as a balance due from Spratt to Dwyer on the full settlement. After that, both of the parties figured over the account several times during the summer of 1908. Mr. Rohret was present with Mr. Spratt and myself at these times."

Spratt testifies:

"After Dwyer and I had settled in Parnell, Mr. Rohret went over with me to Parnell to see how things were figured. This was in the fall of 1908. It was in the winter after the settlement in May, and after I gave the big note."

It appears that at the May settlement, the balance found due from the plaintiff to the defendant was \$9,448.53; that before the note was executed, plaintiff received a credit of \$800 on this amount as his share in what was known as the McShane land deal, leaving a balance of \$8,648.53, for which the note was given.

It appears that afterwards, on the 19th day of September, 1908, plaintiff and defendant entered into an agreement by which the plaintiff agreed to sell and convey to the defendant certain real estate belonging to the plaintiff for the sum of \$85 per acre, to be paid on the 1st day of March, 1909; that on the 28th day of September, they entered into another contract, by which the plaintiff agreed to sell to the defendant certain real estate mentioned in the contract, for the sum of \$16,905, to be paid on the 1st day of March, 1909. In pursuance of said contracts, on the 30th day of September, 1908, the plaintiff executed to defendant a deed for said real estate.

Plaintiff testifies:

“After I gave these two contracts for the land, I shortly afterwards gave him a deed. One day the defendant drove over to Oxford. I went to see Mr. Rohret and consulted him before I gave the deeds. I went to Oxford to see Rohret. He was president of the Farmers Bank in Oxford. We went to Oxford and found he had gone to Iowa City. We found him at Iowa City, and I told him what I came for. We started on the train for Marengo. I talked with Rohret. I told Rohret I was figuring on deeding the land to Dwyer. We went to Colson’s office and figured the amount that was coming to me, if anything, after the mortgage and other things had been paid. Defendant agreed to pay a certain price for the land. There were encumbrances against it. He assumed these encumbrances, and that would apply to the purchase price.”

He was then asked this question:

"In figuring up the purchase price of this, there was included the mortgage in the Scott county bank? A. Yes, sir. Before I delivered the deed to Mr. Dwyer, I gave him credit on the purchase price for \$2,250 and interest, due the First National Bank on the mortgage it held against my land. I gave him credit on the purchase price for a \$2,000 mortgage that the Farmers Loan & Trust Company held against the land. Credit for \$8,000 mortgage that the Scott County Savings Bank held against the land. There was dispute about the taxes against my land, but that is about the way the deal is closed up."

He was asked this question:

"You gave him credit for the mortgage you gave to Mr. Dwyer for \$8,648.53 and interest, didn't you? A. Yes, sir. Q. And gave him credit for the mortgage you had executed to him for \$700, didn't you? A. I think so. And I gave him credit for the judgment for \$29.55 that had been rendered against me. I gave him credit for \$362 and interest for a judgment that was against me. I gave him credit for \$110 taxes and interest that was due and against me. Mr. Rohret was there representing me. Mr. Rohret and Mr. Colson did some figuring. I gave the deed after the figuring was done."

Thus it appears from this record that plaintiff and defendant had been in business together for about four years; that the plaintiff had failed to keep anything approximating an accurate account of his side of the controversy; that they agreed to a settlement; that a settlement was made; that the figures involved in the settlement were frequently reviewed thereafter; that Rohret, who represented the plaintiff, after a full investigation, said that he found nothing that could be urged in plaintiff's favor under the first settle-

ment; that he could find nothing, unless it might be found in the notes involved in the second settlement; that he had the notes involved in this settlement for the plaintiff and has never returned them. Nor was any complaint made, nor does anything appear tending to show that there was anything unfair or wrong or corrupt in the securing of these notes by the defendant from the plaintiff. At the time this settlement was made, all these notes that were involved in the settlement were before the plaintiff, and he then made no complaint. He afterwards gave his note for the amount of the May settlement; he afterwards paid this note by deeding to the defendant the land hereinbefore referred to; the note was then surrendered to him; the defendant assumed the payment of the mortgages and judgments against the land. It appears that subsequently improvements were placed upon the land by the defendant, and that this action was not brought until nearly a year and ten months after the settlement. We think a complete settlement was made between the parties of all dealings between them up to May 27, 1908, and that this settlement has been ratified and affirmed by the conduct of the parties thereafter.

There is absolutely nothing in this record tending to support plaintiff's contention that the defendant acted fraudulently in respect to any of these matters, or that the plaintiff was intimidated by the defendant, or that undue influence was used to induce him to act. Before the settlement was finally consummated by the making of the deeds, he had legal counsel and had the matters involved in the settlement reviewed, and his contention that he was intoxicated at any of the times these transactions took place is wholly without foundation in the record.

As to matters transpiring since said settlement, we find nothing in plaintiff's favor to justify us in allowing him anything upon that issue.

We might say that this record has been exceedingly difficult to handle. The facts involving the statements are so

interwoven with the trial upon the main issue that it has required a reading of the entire record in order to ascertain, with any definiteness, the real facts involved in the settlement. However, we have read the whole record with care and have reached the conclusion herein set out; and upon this record, we think the court erred in not finding that all matters between the plaintiff and defendant, before the 27th day of May, 1908, were fully settled and adjusted between them, and erred in rendering judgment for the plaintiff against the defendant for any amount.

We find, upon the whole record, that there is nothing due the plaintiff from the defendant, and the judgment is therefore reversed and remanded, for a decree in accordance with this opinion.—*Reversed and Remanded.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

J. J. WELLS et al., Appellees, v. COUNTY OF BOONE, IOWA,
et al., Interveners and Appellants.

COUNTIES: Bonds—Submission of Question—Matters Which May

1 **Be Omitted.** Secs. 443-450, Code, 1897, covering the manner of submitting questions to a vote of the people and requiring that "the whole question" shall be submitted, neither contemplates nor requires that each and every detail of the question be submitted to the people. Some matters must necessarily be left to the financial agents of the county. For instance, on the question whether a county shall issue bonds for a courthouse, neither (a) the denomination of the bonds nor (b) the rate of interest thereon need be submitted to the people.

COUNTIES: Proposition to Levy Tax—"Time" Tax Becomes Ef-

2 **fective—Sufficiency of Proposition Submitted.** "The time of the taking effect" of a tax in aid of the building of a courthouse, within the meaning of Sec. 446, Sup. Code, 1913, is sufficiently stated in the proposition submitted to the voters by a provision that said tax shall be levied "year by year . . . until said bonds and interest are completely paid."

COUNTIES: Erecting Courthouse—Contract—Validity—Competitive

3 **Bidding—Fraud.** The contract for drawing the plans for a con-

templated courthouse is not rendered invalid because of the insertion therein of a provision giving the draftsman the right to bid on such construction and providing that, if he was awarded the contract, the cost of the plans should be included in and made a part of the cost of erection, no fraud being claimed and no impediment to competitive bidding being shown.

COUNTIES: Courthouse Site—Discretionary Powers of Board. The 4 wide discretionary powers of the board of supervisors in the selection of a site for a courthouse will not be interfered with in the absence of some showing of a wanton or unreasonable exercise of the power.

Appeal from Boone District Court.—HON. J. L. KAMRAR,
Judge.

WEDNESDAY, JUNE 23, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

ACTION to enjoin defendant county and its board of supervisors from erecting a courthouse and issuing bonds in the sum of \$200,000 to pay for the same. Judgment and decree in the lower court for the plaintiffs. Defendants appeal.—*Reversed.*

Parker, Parrish & Miller and Goodykoontz & Mahoney,
for appellees.

Frank Hollingsworth, County Attorney.

Whitaker & Snell, for defendants and appellants.

Read & Read, for interveners and appellants.

GAYNOR, J.—The plaintiffs are residents and taxpayers of Boone county. The defendants are the board of supervisors, the members of the board, the treasurer and auditor of the county. The action is: (1) To enjoin the defendants from issuing and selling bonds for the erection of a new courthouse; (2) from carrying out a contract for the removal of the old courthouse to a different location on the

lot that it now occupies to make room for the erection of the new courthouse; (3) from carrying out the terms and provisions of a certain contract made with the Fall City Construction Company for furnishing plans and specifications for the new courthouse; (4) from selecting as a site for such new courthouse the site now occupied by the old courthouse; (5) to enjoin the county auditor from issuing warrants for any expense incurred in respect to the above matters; (6) to enjoin the treasurer from paying any such warrants.

Upon a hearing in the district court, a permanent injunction was issued enjoining the defendants as prayed. From the decree so entered, the defendants and interveners, who are also taxpayers, appeal to this court and complain: (1) That the court erred in enjoining the issuing of bonds for the purpose of obtaining money for the erection of the courthouse, and in enjoining the defendants from entering into any contract for the sale and disposition of the bonds, and in enjoining the board of supervisors from levying a tax to pay for the same, and in enjoining the defendants in respect to all the other matters hereinbefore referred to.

The record discloses that at the time of the happening of the matters hereinafter referred to, the courthouse stood at the place and on the site at which it is claimed the defendants contemplated erecting a new courthouse; that this site is in the city of Boone, the county seat of said county. Originally, the place where this courthouse was situated was known as Boonesboro, which afterwards became a ward of the city of Boone. The record discloses that in the year 1913, a petition was filed with the board of supervisors, asking for a submission to the people of the county of a proposition to bond the county for the erection of a new courthouse; that thereafter the board of supervisors, at a regular session, passed a resolution calling a special election of the voters of the county for the 2d day of September, 1913, to vote upon the proposition as to whether the county should

visors contemplate the erection of any public building, they may call a special election and have the question submitted to the people for their determination. The consent of the electors is only necessary when the probable cost will exceed \$5,000.

Sec. 423, Code Sup. 1913, provides that "the board of supervisors shall not order the erection of a courthouse . . . when the probable cost will exceed \$5,000 . . . until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition."

The amount to be expended in the erection of this courthouse in controversy exceeds the statutory limit, and therefore it was necessary that it be submitted to the people for their determination. About this, there is no controversy in this case. Before, however, the matter is submitted to the people for their determination, a proposition to that effect must be made by the board of supervisors, and notice of the same given for thirty days previous to the day fixed for the election in a newspaper, if one is published in the county; otherwise, by posting notices as required in Sec. 423.

Sec. 445, Code, provides that after the proposition has been made by the board of supervisors, and a special election called for the purpose of ascertaining the will of the people touching the proposition, and the thirty days' notice has been given as required, and such election held and a majority of the electors voting thereon vote in favor of the proposition, it shall be effectual in conferring authority upon the board to do as contemplated in the resolution.

Sec. 446, Code Sup. 1913, relates to the manner of submitting this question to the people, and reads as follows: "The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth . . . shall be published once each week for at

least four weeks in some newspaper printed in the county." The notice "must name the time when such question will be voted upon, and the form in which the question shall be taken."

Sec. 447, Code, provides: "When any question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes, . . . and no vote adopting the question proposed will be of effect unless it adopt the tax also."

Sec. 448, Code, provides: "When the object is to borrow money for the erection of public buildings, . . . the rate shall be such as to pay the debt in a period not exceeding ten years; but in counties having a population of forty thousand or over, and where it is proposed to expend \$100,000 or over, the rate of levy shall be such as to pay the debt in not exceeding twenty-five years. In issuing bonds for such indebtedness, when voted, the board of supervisors may cause portions of said bonds to become due at different definite periods. But none of such bonds so issued shall be due and payable in less than five or more than twenty-five years from date."

Sec. 449, Code, provides: "When it is supposed that the levy of one year will not pay the entire amount, the proposition and the vote must be to continue the proposed rate from year to year until the amount is paid."

Sec. 450, Code, provides: "The board of supervisors, on being satisfied that the above requirements have been complied with, and that a majority of the votes were cast in favor of the proposition, shall cause the same and the result of the vote to be entered at large in the minute book, and the proposition shall take effect and be in force thereafter."

Summarizing these statutes, we find that the board of supervisors are by law made the financial agents of the county and of the people of the county in respect to the management of the business of the county. Their powers to act for the

county are defined by statute, and, though defined, are, in some instances, limited by statute. In treating of the power and authority of the board to act for the county, we speak now with reference to the matter here under consideration, and do not attempt or intend to discuss the general powers of the board in its relationship to the county and its affairs. We assume that it will not be controverted that the board of supervisors had power to order the erection of a courthouse where the cost did not exceed five thousand dollars; that when the board of supervisors contemplated the erection of a courthouse, the probable cost of which would exceed five thousand dollars, it had no authority to order its erection until a proposition therefor had been submitted to the legal voters of the county, and a majority of the persons voting upon the question had voted in favor of so doing. When the electors have ratified a proposition of that sort made to them by the board of supervisors, then the board of supervisors is invested with plenary power to carry out the proposition.

The statutes, however, for the purpose of securing the fullest expression of the people upon the proposition, have provided that notice shall be given to the people of the time at which they may express themselves for or against the proposition. When a proposition has been fairly, fully, and intelligently made to the people, so that the intent, purpose, and object of the proposition, or what the board proposes to do, is made fully apparent in the proposition itself, and the people have had the statutory notice of the time at which an opportunity is given them to ratify or reject it, and they have ratified or rejected it, their action is binding upon the board, and on all the taxpayers of the county.

The building of public buildings involves necessarily the expenditure of county funds. These funds are raised through taxes levied upon the property of the people within the county. Even though the taxes had been levied and collected and the money were in the treasury, the board of supervisors

would have no authority to expend more than five thousand dollars of the fund so in the treasury, in the erection of a courthouse, without the consent of the people, expressed at a special or general election. If the fund is not in the treasury of the county to meet an expenditure of that kind, and it is the purpose of the board to borrow money for the erection of the courthouse, the very proposition itself contemplates the repayment of the money so borrowed. This repayment can only be made by the county by the exaction of moneys from the people, through the instrumentality of taxation. Hence Sec. 447 provides that when the question or proposition involves the borrowing or expenditure of money, the proposition must be accompanied by a provision to lay a tax for the payment thereof, a tax in addition to the usual tax, and for that purpose only.

Sec. 448 does not attempt to fix by its terms the rate of taxation which can be fixed by the board of supervisors for the purpose of discharging the obligation assumed in the borrowing of the money. It says that when the object is to borrow money for the erection of a public building, the rate shall be such as to pay the debt in a period therein limited, and in issuing bonds for such indebtedness, when the people shall authorize the creation of the debt, the board may cause the bonds to become due at different definite periods, limiting the time when they become due and payable to not less than five or more than twenty-five years from the date. This then, becomes a matter of computation for the board in issuing the bonds, and the levy fixed by the board must be such as is most likely to accomplish the payment of the indebtedness assumed within the time limited.

Sec. 449 provides that when it is contemplated to borrow money for the erection of a public building, and it is apparent that the levy of one year will not pay the entire amount borrowed, the proposition and the vote must be that the levy fixed be continued from year to year until the full amount is paid.

Turning now to the resolutions and the notice hereinbefore set out, and construing them in the light of the statutes hereinbefore referred to, we find that the resolution provided that a special election be held for the purpose of submitting to the people the question whether or not the county should erect a new courthouse and borrow money to that end by the issuance of bonds; that a date was fixed for the election by the resolution or proposition; that the proposition made in the resolution was to borrow two hundred thousand dollars to pay the cost of the construction of such courthouse; that the proposition was to levy a tax of 1.6 mills on the dollar of the taxable value of the property, in addition to all other taxes, for the purpose of repaying the money borrowed for the erection of such courthouse; that the proposition contemplated that this levy be made year by year until the bonds and interest were paid.

The proposition contemplated the erection of a new courthouse. It contemplated the borrowing of two hundred thousand dollars to be used for that purpose. This was what the resolution proposed, and this is what the board of supervisors desired to do. This proposition was submitted to the people; was voted for and approved by the people. Such election was called by the board for the purpose of enabling the people to express themselves upon the question, and notice contemplated by Sec. 423 was given. In fact, it would seem that, up to this point, all the requirements of Secs. 423 and 443 had been complied with. The proposition involved the borrowing of money. The proposition of the board, of which due notice was given to the electors, was to borrow money for the purpose of erecting a courthouse. This proposition was accompanied by a provision in the proposition itself to levy a tax for the payment of the money so borrowed. The amount of tax to be levied was fixed in the resolution and in the notice published. The proposition to erect the courthouse, the proposition to borrow the money, the proposition to levy a tax at the rate fixed in the resolution and notice,

were ratified by the electors at this special election. If it be conceded that this was the whole question, then it was fully submitted to the people and the people had due notice of the question, to wit, to erect a new courthouse, to borrow two hundred thousand dollars for that purpose, and to levy a tax on the taxable property within the county for the purpose of repaying the money so borrowed.

But it is contended that neither the resolution nor the notice informed the people as to the time of its taking effect or having operation, as required by Sec. 446, and that there-

fore the whole proposition was not submitted to the people for their approval or ratification. Sec. 446 provides for the manner of submitting questions to a vote of the people. Many questions may be submitted to a vote of

2. COUNTIES :
proposition to
levy tax :
"time" tax be-
comes effect-
ive : sufficiency
of proposition
submitted.

the people, and the provisions of this statute must be construed with reference to the particular matter to be submitted; and where the statute says the whole regulation shall be submitted, it undoubtedly means the whole question and the whole regulation touching which the people are called upon to express themselves. The whole question and the whole regulation here, upon which the people were entitled to be heard, was, Shall a courthouse be erected for Boone county at an expense of two hundred thousand dollars, and shall money be borrowed by issuing bonds to that amount to pay the cost thereof, and shall a levy be made upon the taxable property within the county, at a rate of 1.6 mills on the dollar to pay bonds and interest, and shall this levy be made year by year thereafter? The denomination of the bonds and the rate of interest they should bear was not a matter that could be determined by the board and set forth in the resolution or in the notice; for that is a matter of detail work in carrying out the wish of the people, and depends upon the market, the demand for the bonds, and many other contingencies.

Sec. 409 of the Code provides: "In all counties wherein

county bonds are issued in pursuance of a vote of the people to obtain money for the erection of any public building, and wherein the annual tax named in the proposition so submitted to the people for the purpose of paying the annual interest accruing upon such bonds is insufficient to pay the same as it matures, the boards of supervisors are authorized to levy for said purpose, and no other, a tax, not exceeding one mill on the dollar, until said bonds are paid; but this provision shall not prevent the levy of a greater tax than above mentioned, if any such proposition authorized such higher levy."

The next contention is that the resolution and notice did not fix the time when the tax should take effect or be levied. This criticism, we think, is wholly without merit. It fixed the annual levy of the tax and provided that it should be levied year by year thereafter until the full amount of the indebtedness and interest was paid. How this could be made more definite does not occur to us at this time.

We are cited to many authorities claimed to have some bearing upon the question here under consideration. We have examined these authorities, and do not find in them any substantial aid in the solution of the question herein submitted. The levy of the tax was an incident to the authority given to the board by the people to erect this new courthouse and contract an indebtedness for that purpose. The payment of interest was an incident to the authority, and we think was fully covered by the resolution, in so far as it was necessary that there be authority conferred upon the board by a vote of the people. We think the proposition was fully and fairly submitted to the electors of Boone county and was fully ratified by them, and conferred upon the board authority to do as contemplated in the resolution, and that the court below erred in holding to the contrary.

It is next contended that the moving of the old courthouse and fitting it up on the temporary site for the use of the county, pending the erection of the new courthouse, con-

templated the incurring of an expense on the part of the board of supervisors in violation of the provisions of Sec. 423 of the Code of 1897, in which it is said: "The board of supervisors shall not order the erection of a courthouse when the probable cost will exceed five thousand dollars." Disposing of this question, we have simply to say that we think that the great preponderance of the evidence shows that the expense would not exceed the inhibition of the statute, and we do not, therefore, discuss or consider the other reasons alleged against the action of the board in this respect.

It is next contended that, inasmuch as the Fall City Construction Company had been employed by the board to prepare the plans and specifications for the erection of the

new courthouse, with an agreement to pay them a thousand dollars therefor, such contract was void for the reason that there was inserted in said contract a clause to the effect that the Fall City Construction Company might become a bidder for the erection of the courthouse, and that in the event they were successful in bidding, the one thousand dollars should be included in and made a part of the contract price of erection. It is not claimed that there was any fraud practiced in this respect, nor is it shown that the fact in any way prevented competitive bidding. We think there is nothing in this contention, and that the court erred in holding that this contract was void because of the insertion of this provision in the contract.

The last question relates to the selection of the old site as a site for the new courthouse. It appears that the court had been carried on at this old site for fifty years; that the board contemplated erecting the new courthouse on the exact site of the old one. It appears that the county owned this site. It does not appear that it owned any other real estate on which a courthouse could be erected. It is claimed by the plaintiffs that this site is inaccessible; that the location

3. COUNTIES :
erecting
courthouse :
contract : val-
idity : competi-
tive bidding :
fraud.

4. COUNTIES :
courthouse
site : discre-
tionary pow-
ers of board.

is not convenient for the general public. The general discretionary powers of the board are not questioned in the selection of a site for a courthouse. We think that this was largely a matter of discretion on the part of the board. We think there was no evidence of any abuse of discretion which would justify the interference of a court of equity, and we think the court below erred in sustaining plaintiffs' contention on this point. The action of the board involved no wanton or unreasonable exercise of power. Nor do we think that this location is detrimental to the public interest, such as might invoke our equitable jurisdiction.

We think that the court erred in sustaining plaintiffs' contention upon any of the points urged, and the case is therefore reversed and remanded with direction to dismiss plaintiffs' petition.—*Reversed.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

GENEVIEVE L. WILEY, Appellee, v. THOMAS J.
WILEY, Appellant.

DIVORCE: Cruelty—Physical Violence—Circumstances Excusing.

1 Evidence reviewed and *held*, in view of extenuating circumstances, not to justify a divorce on the grounds of cruelty.

DIVORCE: Cruelty—Questionable Conduct of Spouse Excusing Violence.

2 The violent language and conduct of the husband toward his wife may find excuse, though not justification, in the fact that she, by her own questionable conduct, has given him strong grounds to doubt her chastity.

DIVORCE: Defective Decree—Dismissal of Proceeding—Effect on

3 Subsequent Action. A signed but unrecorded decree of divorce, subsequently set aside and the proceeding dismissed, is a nullity and has no bearing on a subsequent divorce proceeding.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

FRIDAY, FEBRUARY 26, 1915.

REHEARING DENIED FRIDAY, SEPTEMBER 24, 1915.

SUIT for divorce resulted in decree as prayed. The defendant appeals.—*Reversed.*

Wade, Dutcher & Davis, and Bailey & Murphy, for appellee.

Ney & Bradley, for appellant.

LADD, J.—The parties hereto were married May 4, 1910, and separated October 3d following. Three weeks later, she filed a petition, asking to be divorced on the ground of cruel and inhuman treatment; but marital relations were resumed on November 20th and continued until February 12, 1911, when they parted again, and on the 18th of that month, a hearing was had and a form of decree of divorce signed by the trial judge, but never entered of record. Subsequently, these proceedings were dismissed, and on April 17, 1913, another petition, praying for divorce on the same ground, was filed. The answer justified the conduct complained of and denied cruelty, and these are the issues to be passed on. Was he guilty of such cruel and inhuman treatment as to endanger her life? Both had lived in Cedar Rapids and must have known something of each other since childhood. He was not a witness in his own behalf and little concerning him prior to their marriage, save his affection for her, appears. Her parents did not live together amicably and were divorced sometime after she found employment and a home at the residence of Joe Dooley in Iowa City, where she remained until her marriage. Dooley, then a single man of about 42 years, had inherited considerable property, had chronic heart trouble, known as "leaky heart," suffered from abdominal and other troubles, habitually carried a cane, and his condition was such that his physician thought it unsafe to leave him

1. DIVORCE:
cruelty: physical violence:
circumstances excusing.

alone. Margaret Shaeffer had been employed by his mother, and after her death acted as housekeeper for his father. She had survived three matrimonial ventures, each terminating in a decree of court. Upon his father's demise, she kept house for Dooley and attended him when sick. Into this household, plaintiff came at 16 years of age. According to her story, she was to receive three dollars per week for her services. A portion of the house was rented to roomers; but these were allowed to go, as the noise annoyed Dooley, and thereafter, he and the two women were the only occupants. He often had guests in the evening and joined with them in drinking beer, as also did plaintiff, notwithstanding the protests of Mrs. Shaeffer. When Dooley was sick—and he was afflicted with long spells of sickness—the women slept in the same room with him but in a separate bed, in order to be ready to attend him. Aside from caring for his property, he had no business except that, in the fall of each year, he operated simple games of chance, such as “Whoop-la” and “Pick-up,” at county fairs. For several years prior to her marriage, plaintiff accompanied him, selling the tickets and attending to the drawings, while he acted as “capper” or “drummed up” patronage before the tent. Usually both slept in the tent, though sometimes in the hotels. When about eighteen years old, she underwent an operation for gonorrhoea, with which she testified to having been afflicted when she went to Dooley's, and this effected a cure, as she and the physician both thought. Such had been the life and environment of the plaintiff, Genevieve Prendergrast, when she married the defendant Tom Wiley, and the subsequent happenings must be measured somewhat in the light of these. After marriage, the parties lived at Cedar Rapids a week or ten days with his parents and her mother, and then he left her with the latter, while gone at Montezuma for a month or more, laying brick. Upon his return, they continued with relatives a few days and he then went to Monticello upon a ten weeks' job. She frequently visited the house of Dooley; and after defendant began work

at Monticello, he came to Iowa City late one night, and, though plaintiff was advised over the telephone by her mother of his coming, she did not meet him, and the doors of the Dooley home where she was were not opened when he knocked. On the following morning, she returned to Cedar Rapids, meeting him, and after returning to Iowa City Monday, went to Monticello, where they boarded together at a hotel six weeks. Upon their return to Cedar Rapids, she lived with her mother a while and he with his folks, then at a house her mother had rented; and later, he rented a house at 315 North Fourth street and at last they were about to set up housekeeping by themselves. But as he brought the first load of furniture to the new home, a letter came addressed to his wife, and he opened it. It was from Joe Dooley, written on the back of a letter she had written him. Let her tell the story:

“He got the letter when he went with the first load, he came back with the dray when they loaded the next time, when we went down the street he called me vile names and said I had been untrue to him because I wrote to come back to my home, and I denied it all to him. When we got into the house he bought the dray people a can of beer, and after they left he started to abuse me, slapped my face, choked me, and throwed me way across the room. My sister-in-law, my brother's wife was there at the time, I cried to her to telephone to mamma, to come, that Tom was abusing me. No, he never struck me before that time. He threatened to kill me lots of times. The first time he spoke to me about this Dooley matter was at Monticello, one night we were going up stairs and I said to him ‘There is Joe Dooley’ he picked up a strap lying in the corner and called him a dirty Irish son of a b—, and said if he came up he would hit him over the head, I was nervous and crying, and asked him to stay in the room with me, he didn't do it. He went and played ball with some of the fellows who were working on the street. Dooley did

not come near my room. I talked to Dooley on the street in front of the hotel. There was going to be a circus in town the next day and Dooley came to town to see if he could work. . . . When Dooley was at Monticello, I talked with him and found out what he was there for; I did not see Dooley during my married life, from the time I was married May 4th, 1910, until I left my husband, except in his home in Iowa City; after Wiley had thrown me down, I went to my mother's home, it was about 6 o'clock when I got there. I was crying and all excited, my face and neck were all red where he abused me, at ten o'clock I started to get sick at 12 o'clock I had a miscarriage."

Her testimony as to what occurred after he had read the letter was corroborated by that of her sister-in-law and not disputed. She visited a friend at Waterloo for several days and then went to the home of Dooley, where she remained until November 20th. Counsel for appellee contend that the letter with the answer was such as to excuse the violence of her husband, and a reading of it leaves no doubt on this score. It read:

"Joe, I just come from the doctors, he said I would have to have an operation before long, and soon to, am very sick, no lie this, if you don't want me back I will go to the hospital in a week or so, and if you do will go to a Dr there and see if I possible can go with out one. Joe, I love you. I told you no lies now or in the other. Jennie.

"I love you Joe, I am so tired of Tom."

His answer was as follows:

"October 2nd, 1910.

"Since you have had one operation here and Dr. Burge has treated you for a long time, you had better come down and see him, sometime Monday before you decide on anything. We are feeling anything but well hear, but would do anything

in our power that would be a benefit to you, or you could consult any physican you choose to. I would write you a long letter but am too nervous. You know you are always welcome and have binn asked time after time."

According to her testimony, the difficulty for which an operation was contemplated was pregnancy in the fallopian tube. If so, the miscarriage obviated the necessity for this. She explained that the terms employed in the letter were owing to parental kindness on Joe's part and that she had no thought of that love which "haunts the greenest spot in memory's waste." But her husband might well have thought otherwise; for he had objected to her having anything to do with Dooley, and other communications from the latter disclose clearly the nature of Dooley's inclination toward her. Thus, on June 16, 1910, he addressed a postal card to her at Monticello from Cedar Rapids, saying: "My dearest Jennie: How are you today? I hope well. I have been very sick, and I sure do show it. I will be there Wednesday, if not before, for the talk. As ever Mary Lamb." On the opposite side of the card was a picture of an ivy with words, "Close clings the ivy to the tree. So in my heart I cling to thee."

Though he and Goat Abbott, a gambler, registered at the hotel under assumed names, they had the "talk" at Monticello. Then came the following:

"Cedar Rapids, Iowa, Aug. 21.

"Jennie, I send you picture of the home you w— beyond repair. In your h—t, do you think you have done right. I will be their when this reaches you."

On the other side of the card was a picture of Dooley's house. Dooley explained that "w—" meant "wrecked" and "h—t" meant heart, and that he wrote because he felt she had not treated him right in leaving so suddenly and without notice when he was sick at the time she married. Here is another:

“Columbus Junction, Iowa, September 9th, 1910. 5 P. M. Left your town at 10 A.M. this morning, will be back tonight. Going to write a book. MARY LAMB.”

On the back was a picture of young women sleeping on barrels at a railway station with the printed words: “We don’t know where we’re going, but we’re on our way.” On the same day, another was written:

“Col. Junction, Iowa. September 9th, 8 P. M. 10.

“Jennie (have you had any more treatment) like (you had) Thursday between 2-4:30 P. M. I will be up in the morning early. It is getting interesting, be sure and be down. I know you will because you said so. Be good. (———)”

On the reverse side was a picture of three semi-nude women, with feet on the table, two in the act of pouring liquor from a decanter, with printing below: “We are having a high old time.” Underneath was written in Dooley’s hand, “Like —— had Thursday.” The series was continued with one from Newton and another from Grinnell on the same day:

“Newton, Sept. 12, ’10. Will be there in C. R. Friday. I suppose you will be at the Broken Home before, write.”

On the other side were the words:

“Your smile: Though others sigh and others sing their dirges solemnly. You smile and bring the joys of spring. The breath of May to me.”

“Grinnell, Iowa, Sept. 12, 1910, 2:20 P. M.

“Mrs. Tom Wiley, Cedar Rapids.

“Your kind message of Frid. just received, you don’t know how happy it makes me feel. Did you have a good time Sunday and Saturday night. I hope your health continues to improve. I am sorry to say mine does not. If you have time

to ans. send to the home you broke & I will get it, will see you at the same place in C. R. as soon as I move.

“MARY LAMB

“Good By.

“I am very sick the strain is fierce. Do you remember one year ago today?”

On the next day he wrote again:

“Newton, Iowa, September 13th, 1910.

“Seven months since February 13th, 1910. 2 years since I got a 30 page letter at this town; one year ago today I was with Mrs. Gleason today I am alone, good by—write if you can spare the time. “M. L.”

He wrote from Newton and Cedar Rapids on the 15th:

“Newton, Iowa, Sept. 15, 1910. Elkader Sept. 15, 1908. If you people are in the land of the living, come back next year. C. R. Friday morning. Dont worrie, if you could only wait.”

On the back is the verse: “I wonder, I wonder why you never write A little friendly line, I’m sure I wrote the last one, So the fault cannot be mine. If some good-natured tricky elf Should whisper in your ear, That I am lonesome for a letter, Wouldn’t you write, my dear?”

“Cedar Rapids, Iowa, Sept. 15th, 1910. Arrived at 5 P. M. ahead of time will look over the ground and get some material for the book. Have you moved, Ha Ha. “M. L.”

On the reverse side of the postal card is the picture of a bandbox with ladies’ hat on top and portions of hair switch attached to the hat and a puppy-dog with nose to switch, and the words: “Ah, I smell a rat.”

The plaintiff denied ever having met Dooley elsewhere than at his house, explained that the signing of “Mary Lamb”

and other allusions was mere "kidding" and that the cards were left on the center table where her husband

2. DIVORCE:
cruelty: questionable conduct of spouse excusing violence.

band could have read them if he had so chosen, and denied ever having sustained improper relations with him. If all this were true,

however, these communications were of a character to accentuate her husband's suspicions, especially in view of his objections to her corresponding with Dooley at all; and when her letter breathing love for Dooley and saying that she was "tired of Tom" came to him while preparing for their first home, he could not well have felt otherwise than indignant and angry. Possibly these letters might not have justified his violence, but they certainly excused it. They revealed to him the true situation, suddenly shattering his anticipations of a home, and caused him to doubt the love he had cherished. What he did ought not to be denounced as cruelty, but denominated the consequence of a natural impulse to resent hypocrisy and bad faith. Of course, explanations were undertaken, but none given which, in view of allusions contained in the postals, explained so as to render them consistent with disinterestedness. The defendant afterwards expressed sorrow to his sister-in-law that he had slapped his wife and declared that he would never do so again, but his wife had gone, and shortly afterwards began suit for divorce. The illness of his mother served as the occasion for writing plaintiff a letter, and she visited the home of defendant's parents about November 20th following, shortly after which his mother was buried, and upon his promise of better treatment, they took up their abode in the house he had rented until February 11, 1911. But, according to her story, they were together but three or four weeks of this time; for she was at DeWitt considerable of the time, owing to the sickness of her grandfather, and at her mother's much. She testified:

"He said he would buy my things for me and I wouldn't have to be asking mamma for things, he did not carry out

these promises. Not one of them. He never bought me anything. There was no change in his treatment of me. He was more grouchy than ever. Sometimes we would fight and he would call me a whore and such names as that; sometimes he would use profanity more or less; he was awfully surly, quarreling all the time; he had an awful temper; he threatened to kill me; he told me that he would make it hot for me if I didn't get a divorce from him right away when I left him. When I came down to Iowa City February 13th I left the house on Sunday morning, went to Mamma's and stayed there and left about noon on Sunday; stayed all night with my sister-in-law. He followed up from the club where he belonged and wanted to know if I would go back to the house with him. I told him no, I was afraid; he followed up across the bridge; I told him I wouldn't go back the way that he was; he told me that if I came back to Dooley's and didn't get a divorce he would make it good and hot for me. I told him that I was coming back here and that if I could still secure a divorce I was going ahead and get it. . . . We had a big quarrel Sunday night and when he pounded me I told him I was going back to Iowa City, and if I could procure my divorce right away and if I didn't, he would make it hot for me or something to that effect. I came on Monday. The quarrel was about my brother's little baby crawling over the floor. We were playing on the floor with the baby. I didn't open the door quick enough to suit him when he came and he got down cellar and got to fighting her and I for playing with the baby. Just his stubborn head. He threw me down and my sister-in-law was going to leave; I called her and told her she couldn't take the baby out a night like that. . . . I left Sunday afternoon. . . . He did not speak to me all day Sunday."

Her sister-in-law corroborated the above, save that she did not mention defendant's having thrown her down. That the affair did not justify a separation is manifest. What hap-

pened doubtless was disagreeable, but in no manner endangered plaintiff's life. If he threatened to kill her, she does not pretend to have been alarmed lest he carry out his threat. If he was not good natured always, this may have been owing to temperament, or possibly he had not entirely forgotten Dooley's postal cards, or again, he may have been suspicious as to several which had come within the few days previous, the author of which was not identified. Thus, on a postal card mailed to her at Cedar Rapids, February 2, 1911, at 8:25 P.M., was written:

"TOMORROW
X E H I
L W S T "

On the reverse side at the top were the words, "Cheer Up," and at the bottom, "You know what I mean," and a picture of a woman astride a railing of a bridge in the embrace of a young man.

Another postal was mailed the same day at 12:25 P. M., on which was written: "Same Place." "1 S. Ave." On the back of this card was the picture of a young man wading in water, with the words: "Cheer up, I am coming." There was also another postal with similar capital letters on it and with words printed on the back: "Cheer up, the 'wust' is yet to come."

In fairness to Dooley, it should be added that he swore that he didn't think he wrote the above cards, and, quoting:

"I don't think I wrote anything to Jennie after she went back home. It isn't true that I wrote those cards intending to have a meeting with Jennie. I have told you I never had any meetings with Jennie, and at the outside I had never seen her in Cedar Rapids over twice. I don't think I wrote those cards, and I am positive I wasn't in Cedar Rapids at that time."

Of course, plaintiff did not know, and swore she had not heard from or seen him from November until her return

to his house in February following. Evidently, Dooley was not sure whether the communications were not his, and Tom may not have quite enjoyed them, and this may explain how he came to be somewhat "grouchy." At any rate, there was nothing he did warranting a finding of cruelty and inhumanity. But it is said that she contracted from him a venereal disease. She testified:

"After I went back with Tom, he was doctoring for a venereal disease, he had been doctoring the whole time I lived with him I think. I used to see stains on his clothes, I showed them to my folks. Dr. Murphy was giving him some kind of Pros-titis treatment, he used to take medicine internally and used syringes; after I was back there about two weeks I started to have discharges I went to see Dr. Bradley, Tom knew it, he said Dr. Murphy said not to have nothing to do with me while he was doctoring and told me he was all right; he thought when we got married but I always had seen these stains on his clothes from the beginning. He said that I couldn't get any because it was an old one that he had years ago; he said Dr. Murphy told him that it was an old one; I had the disease in DeWitt, and told my aunt that Tom had given it to me. I did not treat with the doctors at DeWitt. . . . I was sick and couldn't work and couldn't keep up a fire. One week I stayed at mamma's after I was in DeWitt and was sick there, and he wrote and said the water-works had busted and my aunt said not to go into such a house. I had gonorrhoea then very bad. I have it yet. I've had a discharge continually and had to doctor and the doctor told me I would never be well until I had an operation, my doctor is Dr. Burge."

If she is to be believed, he was so afflicted about the time she married him but she does not pretend to have left him in the first instance because of this, nor to have been assured of his recovery upon her return. Moreover, her evidence in this respect finds its only corroboration in the testi-

mony of her mother to observing stains on his garments when being shown them, except as appears in the testimony of Dr. Burge, which was as follows:

"I have known Mrs. Wiley since 1911. She has been more or less of a chronic sufferer since that time, and has been more or less under my observation and care. I have advised her to have an operation for relief of same. She hasn't been able to do it as yet. She has a chronic condition that requires attention. It is an infection of some sort; gonorrhoea or syphilis might be the cause, either one or both; some of the functions of the body are affected by it. She has been under my care at times since she came back. It varies; I presume that I have been the family physician during that time, so far as I know. I have prescribed medicines for her. I do not know of any time since she came back in February, 1911, that she has been free from this difficulty. I operated on her previous to her marriage, for her condition of peritonitis, I should say. Well it is due to an infected tube and as we say in medicine, with surrounding peritonitis, the infection was reported as specific, she had a similar infection since she came back in 1911; after the operation, for some months she seemed to be fully recovered."

It will be noted that the infection was similar to that from which she had suffered before marriage, and that the physician does not undertake to say that she had recovered, but that "for some months" this seemed to be so. As bearing on this same subject, the testimony of Dr. Love is pertinent. He was asked this question:

"Suppose that a girl of sixteen years of age, has gonorrhoea, and when she is about 19, a skillful physician performs an operation on her, and he says that at that time she seems to be cured, and then suppose that when she is about 21 years of age, she marries, and lives with her husband, and later she has a pronounced case of gonorrhoea. Now then, assuming

for the purpose of this question, that she didn't have connection with a man who infected her with gonorrhoea after the time of her marriage, would it be possible for the old gonorrhoea to infect her husband who lived with her, and for a virulent type of gonorrhoea to arise between them, due to the gonorrhoea or the case of gonorrhoea, that she was operated upon some two or three years before that?"

A. "Well, to begin with, I don't know of any operation that could be performed on any individual for the cure of gonorrhoea, and in the second place, after an individual has been infected with the gonococci, and has gonorrhoea, after a time the tissues of that individual become immune to the attacks of this organism, and they are seemingly not suffering from the disease at all. On the other hand, if the individual having this latent gonorrhoea or chronic gonorrhoea as some call it, if they have any sexual intercourse with one of the opposite sex, the very organism that they are immune against becomes virulent and will set up an acute gonorrhoea in the second party, and this party then, after the organism has become virulent, the second party can again infect the original carrier of the host with an acute gonorrhoea. That is a fact that has been proven to the entire satisfaction of a great many observers, many times."

Q. "How long may one be afflicted with a dormant or an undemonstrative case of gonorrhoea after being seemingly cured?"

A. "They may carry it for years, in fact, there are cases on record where there has been no infection, no history of any infection, since early manhood or womanhood, and it has lain for years and never shows up until after marriage and intercourse with an innocent individual."

This tends to explain the condition of the plaintiff and probably that of defendant; and even if he also had the disease, she was not in a situation to complain, and doubtless for this reason she did not insist thereon as the occasion of leaving him. If both are tainted, neither has complained,

except in this trial, for the very probable reason that neither was able to trace the cause to the other; though on the theory of the physician, defendant's condition may have come as by him said to be possible. Though Dooley was sorely afflicted physically, the record, even if raising a suspicion, hardly justifies the suggestion that the disease is traceable to him. The evidence is in conflict as to whether defendant furnished adequate clothing and support, though there is a decided preponderance that he was somewhat negligent in this respect. Their manner of living accounts in large measure for this and, in any event, lapse in this duty is only corroborative evidence in establishing the ground of divorce alleged. The record fails to establish cruelty on defendant's part endangering the life of plaintiff, and this was essential to justify the entry of a decree. Undoubtedly, defendant could not quite forget the situation disclosed by her letter to Dooley and his wooing by postal cards. He could not treat her as before and it was not his fault. But neither what he did on October 3rd nor his discontent and "grouchiness" when they came together afterwards justified her departure. The effect was not the impairment of her health, but to furnish her an excuse to fly to the shelter of the amiable Dooley. And although the wife of another, she accompanied him at the county fairs in the fall, presenting the enticing games of "Whoop-la" and "Pick-ups" (whatever these may be), and sleeping in the tent with only a movable canvas separating them, though she testified that another slept with him. This course is said to have been pursued to save the sanity of

Dooley, and if so, furnishes an example of self-sacrifice on her part worthy of a better cause and evidencing the strength of her attachment. But enough has been said to point out the difficulty and to indicate the cause. Undoubtedly, the defendant as well as plaintiff, supposed they were divorced by the signed but unrecorded decree which was set aside, and such was the information imparted to defendant

3. DIVORCE: defective decree: dismissal of proceeding: effect on subsequent action.

by the attorney for plaintiff. But it was inadvisedly signed by the judge, for neither party had resided in the county for a year previous; and it may be that, but for the institution of a suit by Wiley against Dooley for damages in consequence of the alleged alienation of his wife's affections and the discovery of the opinion in *Hamilton v. McNeill*, 150 Iowa 470, the condition of the record in the first case might not have been investigated. That furnishes no reason, however, for not exacting full proof of the allegations of the petition, and this even though the defendant may have courted another woman and showered her with silly postal cards. Indeed, the ruling in *Hamilton v. McNeill* furnishes good reason for scrutinizing this record with care, not only because the law contemplates satisfactory proof of the statutory grounds for divorce, but also to obviate the escape of anyone who may have been instrumental in breaking the marriage ties from meeting the consequences of his wrongdoing.

The decree is—*Reversed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

BENNETT SAVINGS BANK et al., Appellees, v. W. S. SMITH et al.,
Appellants.

PARTIES: Joinder—Maker of Note—Assignee Assuming Payment

- 1 —Foreclosure. Several parties who are bound for the same debt but on different contracts may be joined in the same suit. So held in an action against the makers and endorsers of a note and one who had assumed its payment. (Sec. 3465, Code, 1897.)

VENUE: Foreclosure—Assignee Assuming Payment. An assignee

- 2 of lands, who has assumed the payment of the mortgage thereon, is not, in an action of foreclosure properly brought in the county where the land is situated, to which action he is a party, entitled to a change of venue to the county of his residence (Sec. 3504, Code, 1897), because (a) such assignee is a necessary party to the action (Sec. 3462, Code, 1897), and (b)

such action to foreclose must be brought in the county where the land is situated (Sec. 3493, Code, 1897).

JURY: Right To—Waiver. He who proceeds to trial to the court
3 without objection waives his right to a jury. (Sec. 3733, Code, 1897.)

JURY: Equitable Action—Injection of Law Issues by Defendant
4 —**Right to Jury.** A defendant who presents a law issue in an action properly brought in equity has no right to a jury trial thereon.

MORTGAGES: Merger—Intention. Merger implies two distinct
5 estates meeting in the same person at the same time. Then, again, merger is essentially bottomed on the matter of intention. *Held*, that the facts furnish no ground for the application of the doctrine of merger.

PRINCIPLE APPLIED: B owned land and conveyed to A. A executed a note to B and secured the same by mortgage on said land. B assigned the note and mortgage to a bank. Later, B again became the owner of the land by conveyance from A, and conveyed to S, who assumed and agreed to pay said mortgage. The bank brought suit to foreclose against A, B, and S, whereupon B took an assignment of the note and mortgage from the bank and was substituted as plaintiff. *Held*, neither the act of B in acquiring title to the land from A, nor the act of B in taking an assignment of the note and mortgage from the bank, furnish any ground for applying the doctrine of merger.

EVIDENCE: Estoppel—Laches—Belated Claim—Assumption of
6 **Mortgage Debt.** Long delay in making complaint as to the correctness of a contract, while enjoying the benefits thereunder, may preclude one from questioning the correctness of such contract.

FRAUD: Representations—Statements as to Value—Opinion.
7 Certain statements held to be simply matters of opinion and to furnish no basis for a charge of fraud.

Appeal from Linn District Court.—HON. F. O. ELLISON,
Judge.

MONDAY, MAY 17, 1915.

REHEARING DENIED SATURDAY, SEPTEMBER 25, 1915.

SUIT for foreclosure of mortgage resulted in decree as prayed, from which W. A. Smith appeals.—*Affirmed.*

J. S. Dewell and *C. O. Boling*, for appellant.

F. J. Casterline & Son, for appellees, Wm. Bierkamp, Jr., and the Bennett Savings Bank.

LADD, J.—William Bierkamp, Jr., was owner of a livery barn and four lots in Bennett, and conveyed them to Albert Bierkamp. The latter, on August 6, 1906, executed his promissory note for \$2,500, payable in five years and bearing interest at the rate of 6 per cent. per annum, to William Bierkamp, Jr., and to secure same, a mortgage on said property. This note and mortgage were assigned to the Bennett Savings Bank. Subsequently Albert Bierkamp conveyed the property back to William Bierkamp, Jr., and the latter, exchanging it for Fortune Dyke mining stock, executed a deed July 19, 1909, of the same to W. A. Smith, with usual covenants of warranty and containing a stipulation that “the second party assumes and agrees to pay a mortgage on the said described property of \$2,500 with interest at 6 per cent. from June 15, 1909”. As the note and mortgage were not paid at maturity, this suit for judgment and foreclosure was begun December 4, 1911, the Bierkamps and Smith and his wife being made parties defendant. Thereafter the bank assigned the cause of action to William Bierkamp, Jr., and he was substituted as party plaintiff. Certain motions were overruled, an answer filed, a hearing had on the merits, and decree of foreclosure entered as prayed. Only the questions raised in argument will be given consideration.

I. The defendant Smith moved that plaintiff be required to elect whether he would prosecute his cause of action on the note or on the assumption of its payment in the deed, and that

upon such election, the other cause of action be dismissed. The motion was rightly overruled. Sec. 3465 of the Code provides: “Where two or more persons are bound by contract or by judgment, decree or statute, whether jointly

1. PARTIES :
joinder : maker
of note : as-
signee assum-
ing payment :
foreclosure.

only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them." In this action, Smith, in the deed, assumed and agreed to pay the note and mortgage, and thereby became primarily liable therefor, and the makers merely sureties for him. *Corbett v. Waterman*, 11 Iowa 86; *Marble Savings Bank v. Mesarvey*, 101 Iowa 285. This being so, though liability arose on separate instruments, both might, under the express language of this section, be made parties. See *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573; *Darling v. Blazek*, 142 Iowa 355; *Bossingham v. Syck*, 118 Iowa 192. There being no misjoinder, the motion was rightly overruled.

II. Defendant Smith, being a resident of Harrison county, moved for a change of venue to the district court of that county; for that, as is said, he is liable on a contract, if at all, separate and independent of the note and mortgage, to which he was not a party. The motion was overruled. Sec. 3493 of the Code exacts that "An action for the foreclosure of a mortgage of real property, or for the sale thereof under an incumbrance or charge, or to enforce a mechanic's lien thereon, shall be brought in the county in which the property to be affected, or some part thereof, is situated." As Smith held title to the property, he was a necessary party to the proceeding, for only by making him a party could his equity of redemption be cut off. *Porter v. Kilgore*, 32 Iowa 379; *Tucker v. Silver*, 9 Iowa 261. See cases collected in 9 Ency. P. & P. 305. As suit must have been brought in Cedar county and Smith was a necessary party, his motion for change of venue was rightly overruled. This conclusion was not obviated by any offer on his part to reconvey the land, for neither the bank nor Bierkamp was under any obligation to accept a conveyance in satisfaction of the indebtedness.

2. VENUE: foreclosure: assignee assuming payment.

III. But it is argued that Smith was entitled to a jury trial of the issues involving his personal liability for the debt. In the first place, he proceeded to trial to the court and thereby impliedly waived a jury, if he had a right thereto. *McGuire v. Kemp*, 3 G. Greene 219; *Hawkins v. Rice*, 40 Iowa 435. In the second place, the cause was properly on the equitable side of the calendar, and the interposition of a defense at law was not ground for the transfer to the law side, even if such a motion had been made, nor was there error in exacting its trial to the court without the intervention of a jury. *Evans v. McConnell*, 99 Iowa 326; *Eller v. Newell*, 159 Iowa 711.

IV. From the statement of facts, it will be recalled that William Bierkamp, Jr., conveyed the land to his brother Albert, and the latter executed back to William the note and mortgage sued on, which William assigned to the bank. Subsequently, Albert conveyed the land back to William, and he to Smith. It is now contended that when William acquired the cause of action by assignment from the bank, this assignment operated to satisfy the mortgage under the doctrine of merger. It did not purport to be his debt and he did not hold the legal title to the land. Moreover, it appears there was no design to satisfy the debt or discharge the incumbrance, but on the contrary, the assignment was for the express purpose of transferring the cause of action to William Bierkamp, Jr., to enable him to enforce the claim. In these circumstances, there is no room for the inference that there was a merger. But it is said that, upon the conveyance of Albert to William, this happened. Such a result was obviated by the bona fide ownership of the security by the bank. It was not a case of ownership of the hypothecated property and the debt merging in one person, as in *Byington v. Fountain*, 61 Iowa 512, and *Fouche v. Delk*, 83 Iowa 297. There was no merger.

3. JURY: right to: waiver.

4. JURY: equitable action: injection of law issues by defendant: right to jury.

5. MORTGAGES: merger: intention.

V. The exchange was made through one Townsend as agent. He was acting under written instructions from Smith in disposing of Fortune Dyke mining stock. On May 12, 1909, Townsend wrote Smith, saying:

6. EVIDENCE: es-
toppel: laches:
belated claim:
assumption of
mortgage debt.

“The livery and feed barn being incumbered is not what I would call gilt-edged by any means, but I do believe that it will deal for a good automobile and maybe two of them, and do it a whole lot quicker than the mining stock will go. My idea is that an offer of say 16,000 shares of common or 8,000 shares of the preferred and get the equity, then to pound the equity for automobiles or some cheap land. This party says that the property was appraised by the directors of the local bank in Bennett and they loaned \$2,500.00 on it, or half the appraised value. If you say so, I will offer him the stock as above for the barn.”

On the back of the letter Smith endorsed his instructions: “You can make offer 4,000 preferred and 16,000 common, making 20,000 in all.”

With Townsend's letter was enclosed typewritten circular from Bierkamp, in words in part:

“A livery, feed and sales barn, located centrally and on the main street, covers four lots 100 by 140 feet. Lots alone worth \$3,200.00 or \$4,000.00. Barns, feed yard, office, high fence, all new, and cost \$3,000.00 to \$3,500.00 to build. Only barn of its kind in town and would be a money-maker for hustler, as Bennett is located on a branch railroad with only two passenger trains daily. Property ought to rent easily for \$40.00 or \$50.00 per month. The local bank has a \$2,500 loan on it at 6 per cent., equity \$3,500.00 if taken soon. \$2,500.00 insurance.”

Townsend testified that he accepted these representations without examining the property, that he received the deed

to Smith of the Bennett lots and forwarded it with the abstract to him for examination before the deal was closed, and that he recalled no complaint from Smith with reference thereto, and that there was nothing said, in making the exchange, about Smith's assuming or paying the mortgage. Smith's testimony limits Townsend's agency to exchanging for property unincumbered, and he says that it was not represented that he was to pay the mortgage, that he has no recollection of ever having seen the deed until receiving it from the bank in September, 1912; that he relied on Bierkamp's circular letter and that he never examined the abstract. The property at that time was worth about \$2,000. As seen, the date of the deed was July 19, 1909, and September 9th following, the cashier of the bank wrote Smith for the papers "belonging with the loan" on the livery stable, advising that the interest was due, and if not sent, another abstract would be procured and expense thereof added to the mortgage. Smith responded, on September 10th:

"I am in receipt of yours of the 9th and in reply will say, this is the first communication that I have received, and will send all of the papers to you including the deed and check for \$30.00 to help pay on interest and expenses of insurance, and I wish you to rent the property if it is not rented. Keep the rents and keep up the insurance and do what you think is for the best, and I wish you would tell me about what the property is worth, if anything above the incumbrance of \$2,500.00. I just found your other letter mixed up with the papers that was sent to me. I will close, hoping to hear from you, I remain."

The cashier acknowledged receipt of enclosures September 13th, and omitting same said:

"The barn is renting for \$15.00 per month and to a good tenant, who will continue to occupy it. Please advise me from what date you are to receive the rent? No doubt you

are to have the rent for some time back. Relative to the value of the barn. It is a little hard for me to say just what it is worth. I should think some little over and above the mortgage, however. I will try to look after the property for you in a manner that will be satisfactory to you, and you may write me freely as to anything you might wish done.

“Yours very truly,

“E. P. Wingert, Cashier.

“I presume you want me to have the deed from B., Jr., to you recorded. Please advise.”

Smith replied September 17, 1909, as follows:

“Yours of 13th at hand in regards to rent. The rent belongs to me from the time I commenced paying interest on the loan. Hold all rents to pay interest and taxes and insurance and anything that you lack to do this make draft through State Savings Bank, Mo. Valley. Thanking you for tending to this business. Have the deed recorded in my name.”

Smith continued in possession of the premises through tenants until July 19, 1911, when he wrote that “If don’t get a chance to sell it I shall let the mortgage take it.” He testified that he did not know, until about this time, that the deed contained the assumption clause; but he had accepted it when tendered in compliance with the conditions of the agreement to exchange properties, had mailed the same to his agent and directed him to have it recorded. In these circumstances, the language of the deed must prevail. Nor do we think the

record such as to warrant the inference that he was deceived into the exchange of properties with Bierkamp. Shortly after the deal, he inquired of his agent at Bennett “what the property is worth, if anything above the incumbrance of \$2,500.00,” and was answered, “Some little over and above the mortgage.” With this information, he caused the deed to be recorded and enjoyed the possession and use of the prop-

7. FRAUD: representations: statements as to value: opinion.

erty about two years without complaint, and until foreclosure proceedings were threatened. Moreover, the circular on which Smith claims to have relied is not shown to have been untrue in any particular except the value of the property, and this, under the circumstances disclosed, was a mere expression of opinion. Nothing in the communications of Bierkamp which were mailed from Denver, Colo., indicated any claim on his part of special knowledge concerning the property or tended to deter the fullest investigation by Smith, nor was there any evidence tending to show that he was aware that neither Smith nor his agent knew the value of the property. In other words, there is nothing in the record to justify construing what was said as representation of fact as distinguished from a mere opinion. *Hetland v. Bilstad*, 140 Iowa 411. Moreover, Smith exchanged mining stock which proved worthless, and with no estimated value,—a part of that he was exploiting through Townsend,—and, as clearly appears from the latter's letters, with the notion of taking chances of getting something out of it easier than from stock. We are satisfied that no fraud was perpetrated, and that the decree should be and it is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

O. K. BRUNSVOLD, Appellee, v. K. C. MEDGORDEN, Appellant.

EXCHANGE OF PROPERTY: Payment in Second-Hand Property—

Partial Default—Measure of Damages. He who buys property at an agreed price and agrees to pay for it in certain identified second-hand property, invoiced at wholesale cost, and *fails to reserve the right* to make up any deficiency in *other* similar second-hand property, must, under an agreement implied by law, in case said second-hand property fails to invoice to the agreed purchase price, make up the deficiency by paying a dollar in cash for each dollar of deficiency, and not an amount equal to the *actual money value* of the second-hand property of which there was a deficiency.

PRINCIPLE APPLIED: A contract provided: "I agree to convey the following lands, . . . Consideration of land to

be \$9,600, and agree to take in payment therefor the stock of merchandise . . . situated on (certain named lot) in Ellsworth, Minn., . . . at wholesale cost mark. Should said stock not amount to \$9,600, I agree to take groceries in an amount to make up \$9,600, situated (in a certain building) in Waseca, Minn., at wholesale cost. In no case shall I be obligated to receive more than \$9,600 in stock."

The combined wholesale-cost-mark invoice of both stocks, which was delivered, fell \$1,054 short of \$9,600. There was evidence that the wholesale cost of second-hand goods of the kind in question was 30 per cent. *above* the actual money value, but *held*, the 70 per cent. was not the proper measure of damages.

Appeal from Winnebago District Court.—HON. J. J. CLARK, Judge.

MONDAY, JUNE 21, 1915.

REHEARING DENIED SATURDAY, SEPTEMBER 25, 1915.

ACTION at law to recover the balance of the purchase price of a tract of land sold or exchanged by plaintiff to the defendant for certain stocks of merchandise. There was a trial to a jury, resulting in a verdict and judgment for the plaintiff, and defendant appeals.—*Affirmed.*

Gordon & Osmundson, for appellant.

H. H. Dorland, for appellee.

DEEMER, C. J.—The parties hereto, on July 12, 1912, entered into a written contract for an exchange of properties, from which we extract the following:

"This agreement entered into by and between O. K. Brunsvold of Kensett, Worth County, Iowa, party of the first part, and K. C. Medgorden of Lake Mills, Winnebago County, Iowa, party of the second part, to wit:

"The party of the first part agrees to convey by warranty deed clear of encumbrance the following described land: The south half (S. ½) and the northwest quarter (N. W. ¼) Sec-

tion eleven (11), Township one hundred and thirty-eight (138), range seventy-two (72), Kidder Co., N. Dak., containing 480 acres, more or less, according to U. S. Govt. Survey. Consideration of land to be nine thousand six hundred dollars (\$9,600) and hereby agree to take in payment therefor the stock of merchandise consisting of Dry Goods, Shoes, Notions, Groceries, Clothing, Ladies' Furnishings, etc., together with fixtures and particular items of which are listed and herewith attached making a part of this agreement, said stock and fixtures located in the building situated on Lot 12, Block 7, village of Ellsworth, Minn., merchandise to be taken at wholesale cost mark as are. Should the said stock and fixtures not amount to the \$9,600, the party of the first part hereby agrees to take groceries in amount to make up the \$9,600; said groceries now located in the A. Grapp building, Waseca, Minn.; said groceries to be taken at wholesale cost at Waseca, Minn., total of stock not to exceed \$9,600, and further agrees to furnish abstract of aforesaid land showing good marketable title."

Pursuant to the contract, plaintiff conveyed his land to defendant, and defendant transferred the Ellsworth stock with fixtures to the plaintiff, the invoice price for the same being \$8,174.09. The Waseca stock was also sent to plaintiff and it invoiced \$369.98, leaving a balance still due plaintiff, either in stock or money, of \$1,054.93. Plaintiff alleged that the Waseca stock which was shipped to him was old, unsalable, wormy, and unfit for food; that the goods were warranted and represented by defendant to be fresh, staple, and salable; and he (plaintiff) refused to receive the same and notified defendant thereof, and that the goods were at Ellsworth, Minnesota, subject to defendant's order; and he asked judgment for the difference between the contract price of his land, to wit, \$9,600, and the invoice value of the Ellsworth stock, to wit, \$8,179, or \$1,420.91, and in addition thereto,

the amount of freight paid on the Waseca stock, to wit, \$23.47.

Defendant denied that he warranted the Waseca stock, and alleged delivery thereof to the plaintiff as agreed. He also averred, "That after the time he shipped said groceries from Waseca, Minnesota, to plaintiff at Ellsworth, Minnesota, upon finding the said groceries did not supply the deficiency between the price of the land and the invoice price of the stock at Ellsworth, Minnesota, it was afterwards, to wit, on or about the 4th of October, 1912, orally agreed between the parties, to wit, the plaintiff and the defendant, that the defendant should have further time to supply the deficiency from other stock which the defendant could furnish the same from some other stock of goods. That said agreement was in modification of the original contract of which Exhibit 'A' is a copy; that in said oral agreement no specific time was set in which defendant should furnish the balance of said stock, but defendant avers that he has in good faith and in compliance with said oral agreement been trying to procure the balance of the goods promised to the plaintiff, but had not had reasonable time before the commencement of this action in which to do so; that the plaintiff has made no demand upon the defendant to furnish the balance of said stock before any specific time and before the commencement of this action, and avers that this action is prematurely brought. Defendant further states that in making the contract of which Exhibit 'A' is a copy, the land in North Dakota was valued at \$9,600 in consideration of that price for the full value of same; the stock to be in general of the same kind and quality as the stock at Ellsworth, Minnesota; that second-hand stocks of goods are not worth to exceed 70 per cent. of the cost price, and the money value of the amount of goods required under said contract to supply the deficiency between the goods already transferred and tendered to plaintiff, and said \$9,600, would be less than \$750. That if said sum of \$23.47 or any other payment was made to said Chicago, Rock Island

& Pacific Ry. Co. it was made voluntarily by the plaintiff and not at the instance and request of the defendant."

EXCHANGE OF
PROPERTY: pay-
ment in second-
hand property:
partial default:
measure of
damages.

The trial court submitted to the jury the issues made by the pleadings and also gave the following with reference to the damages to be awarded plaintiff in the event they found for him:

"You are instructed that unless you find the defendant has proved his affirmative defense aforesaid, and further find that defendant is not entitled to credit for the groceries shipped from Waseca to Ellsworth, invoiced at \$365.98, you must find for the plaintiff for the full amount of the difference of \$1,420.91 between the price of the land and the Ellsworth stock, as claimed, with six per cent. interest thereon from August 13, 1912; and if you find the defendant has not established his affirmative defense, but that he is entitled to the credit of said \$365.98, you will deduct that sum from the \$1,420.91 and find for the plaintiff for the balance with interest thereon from August 13, 1912. If you find the defendant entitled to said credit of \$365.98, and that he has established by the evidence as hereinafter stated, his affirmative defense, your verdict must be for the defendant. If you find the plaintiff entitled to recover the entire amount of \$1,420.91, you will also add to this sum the amount of freight paid by him, which was \$23.47, and include the entire sum in the verdict, but if you find the defendant entitled to credit of \$365.98 for the shipment of goods from Waseca, and that the plaintiff was not justified in refusing the acceptance thereof, he cannot recover anything for the freight paid by him thereon.

"With regard to the shipment of groceries of \$365.98 from Waseca to Ellsworth, in order to prevent a credit for the full amount thereof upon the plaintiff's claim, the burden of proof is upon him and he must prove by the preponderance or greater weight of evidence before you, that the amount

worth stock, it is manifest that defendant could not substitute any other stock or any other goods in place of the Waseca stock, and plaintiff could not go upon the open market and purchase any such goods, even were he disposed to do so. In these circumstances, it is clear to us that defendant must make up the difference in cash, just as if he had expressly promised to pay the difference in cash. If he had expressly agreed to the latter, there would be no doubt as to the rule of damages. It is true that part at least of the purchase price was to be paid in goods and the parties may have thought that the goods would invoice to the full amount of the purchase price of the land; but, as already said, if they did not so invoice, there was an implied promise to pay the balance in cash, for there were no other goods of like character which defendant could substitute, and the measure of damages is not the value of goods of like character which plaintiff did not agree to take, but the difference between the invoiced price of the goods and the value fixed upon the land.

It must be admitted that there is a decided conflict in the cases on this main proposition, and it is doubtless true that if defendant had delivered no part of the stock called for by the contract, plaintiff's recovery would have been limited to the value of the stocks and fixtures which defendant promised to give in exchange for the land. In the absence of any evidence, it would be presumed, of course, that the stocks were worth the estimated price, subject, however, to proof that they were of much less value, the agreed value being treated as prima-facie evidence of true value. See *Fagan v. Hook*, *supra*; *Norton v. Hinecker*, 137 Iowa 750. See same case fully annotated in 15 Am. Ann. Cases, p. 474, also *Pier-son v. Spaulding*, 27 N. W. (Mich.) 865.

Here the parties contemplated a payment for the land by the delivery of specified goods, and the goods, so specified, according to the verdict of the jury, were delivered, leaving part of the purchase price unpaid. Defendant insists that he is liable only for a shortage in the goods, and that plain-

tiff's recovery should be limited to the actual value of the goods had there been no shortage, while plaintiff insists that he was not bound to take any goods save those specified, and that if these did not amount to the price fixed for his land, he is entitled to the difference in cash. We are constrained to agree with plaintiff in his contention. True, he agreed to accept certain stocks of goods in payment for the land conveyed, the land having a fixed value and the goods and merchandise having, for trading purposes, a determinative value, but he did not agree to take any balance that might remain in goods of like quality or value; and the necessary inference is that, if there was any balance, it should be paid in cash. In order to safeguard himself, he promised that he was not to take more than \$9,600 in value from the stocks of goods.

After all is said, the question narrows itself down to the proper construction of the contract. If the entire consideration was to be paid in property, and defendant could have fulfilled his promise by the delivery of specific property, doubtless the measure of plaintiff's recovery would be the value of that property, rather than the estimate put upon it for the purpose of exchange. But as defendant could not comply with the terms of his agreement without delivering specific property to the full amount of the exchange price, and could not substitute other property, he must be held liable for the difference in the exchange prices; and this was the measure of damages fixed by the trial court. We have been cited to no case precisely in point, and have not found any which seem to exactly fit the case. The proposition is largely one of first impression, and we are satisfied that; for the reasons indicated, the trial court announced the correct rule. The judgment must, therefore, be and it is—*Affirmed*.

LADD, GAYNOR and SALINGER, JJ., concur.

JOHN R. FUDGE et al., Appellants, v. B. W. KELLEY,
Appellee.

EVIDENCE: "Parol Evidence" Rule—Contracts Partly Written,

- 1 Partly Oral—When Oral Part Provable—Warranty.** A contract may be partly in writing and partly in parol. If the parol part is concerning a matter not covered by the writing, then, the written and parol parts being harmonious, the parol part may be shown along with the written. *Held*, an oral warranty might be shown along with the written part of the contract.

EVIDENCE: "Parol Evidence" Rule—Written Warranty Fore-

- 2 closing Oral Warranty—When Rule Inapplicable.** Assuming the the rule that a written warranty forecloses farther inquiry as to warranties, yet the rule does not apply when the written warranty was inserted by accident, gratuitously, not as a part of the real transaction, and without consideration.

PRINCIPLE APPLIED: Plaintiff leased certain premises of defendant, and, as a part of the deal, purchased the defendant's dairy, including cows, hay, corn, a silo and other produce, at a certain agreed price. A written contract was executed accordingly. Later, when plaintiff paid a part of the consideration and executed his notes for the balance, he was given by defendant a lease of the premises and a bill of sale, in the ordinary printed form, the latter containing the following printed clause, to wit: "I hereby warrant the title of said property and that it is free from any incumbrance or liens." No talk was ever had by the parties concerning such a warranty, and no consideration passed by reason thereof. *Held*, such written warranty was no obstacle to plaintiff's showing an oral warranty by defendant that all the cows were with calf.

APPEAL AND ERROR: Appeal—Notice of—Sufficiency—Error in

- 3 Date of Judgment.** A notice of appeal sufficiently describing the judgment appealed from is sufficient, even though containing an error as to the date of such judgment.

Appeal from Polk District Court.—HON. LAWRENCE DEGRAFF,
Judge.

SATURDAY, APRIL 10, 1915.

REHEARING DENIED SATURDAY, SEPTEMBER 25, 1915.

ACTION for damages consequent upon alleged false representations and breach of warranty. The allegations of the petition were put in issue and a counterclaim interposed. Jury was waived and on trial, the petition was dismissed and judgment entered on the counterclaim. The plaintiffs appeal. —*Reversed.*

Graham & Graham, for appellants.

Miller & Wallingford and *Oliver H. Miller*, for appellee.

LADD, J.—I. The defendant was operating a dairy in Des Moines and entered into a written contract with plaintiff John R. Fudge, under which he agreed to sell 21 cows and other property. According to Fudge, defendant said he would guarantee all of the cows to be with calf and the purchase was made in reliance thereon. Only five proved so to be and, as the matter of warranty was not touched in the contract, extrinsic evidence was admissible to establish the same as resting in parol. *Fawkner v. Smith Wall Paper Co.*, 88 Iowa 169; *Lake Manawa Ry. Co. v. Squire*, 89 Iowa 576. This is on the theory that, the contract resting partly in writing and partly in parol, the latter, being in no wise inconsistent with former, might be shown.

The defendant denied making the oral warranty, but testified to having told Fudge that all the cows had been bred. The trial court found that defendant had warranted the cows to be with calf, as alleged, but held that, as the bill of sale subsequently delivered contained the clause, "I hereby warrant the title of said property and that it is free from any incumbrance or liens," the alleged oral warranty might not be proven. Such written warranty of title was not in pursuance of any talk or understanding between the parties and was merely a part of the

1. EVIDENCE:
"parol evidence" rule:
contracts partly written,
partly oral:
when oral part provable:
warranty.

2. EVIDENCE:
"parol evidence" rule:
written warranty foreclosing oral warranty:
when rule inapplicable.

printed form of a blank bill of sale used, and the bill of sale was turned over, with a lease of the premises, on payment of a part of the purchase price in money and the execution of a note and chattel mortgage securing it for the balance. No additional consideration passed, owing to the insertion of the written warranty. On the contrary, the price paid was that which the parties had agreed upon in the preliminary written agreement, and we are of opinion that the oral warranty, if made, was binding, and that the insertion of the written warranty of title in the bill of sale added nothing to the preliminary contract, as (a) in any event defendant was bound to pass a good title, and (b) such written warranty was without consideration. *Valerius v. Hockspiere*, 87 Iowa 332; *Aultman & Co. v. Kennedy*, 23 N. W. (Minn.) 528.

Having found that there was a warranty, the court should have assessed the damages consequent upon the breach thereof. The facts of the case do not bring it within the rule of the decisions cited by appellee. See *Western Electric Co. v. Baerthel*, 127 Iowa 467; *Four Traction Auto Co. v. Hurni*, 156 Iowa 725.

II. Judgment was entered October 15, 1913. Appeal was perfected therefrom and then dismissed, and thereafter plaintiffs moved for new trial on the ground of newly discovered evidence. This motion was overruled April 4, 1914, and three days later, plaintiffs caused notice of appeal to be served, reciting that they "have appealed from the judgment of the district court aforesaid rendered against them in the above entitled cause on the 4th day of April, A. D. 1914." This error in the date was not material, as the judgment was sufficiently described without it. *Kennedy v. Rosier*, 71 Iowa 671; *Parker v. Assn.*, 108 Iowa 117.—*Reversed*.

8. APPEAL AND
ERROR: ap-
peal: notice
of: sufficiency:
error in date
of judgment.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

BENJAMIN C. JOHNSON et al., Administrators, etc., Appellees,
v. HAWKEYE COMMERCIAL MEN'S ASSOCIATION, Appellant.

INSURANCE: Accident Insurance—Non-Liability “When Violating
1 Law”—Trespass. The provision of an accident insurance policy,
to the effect that the insurer shall not be liable if the insured is
injured or killed “when violating the law,” is not violated by
the insured passing over a fence upon a railroad track at a point
in the fence used daily by the public for many years.

INSURANCE: Injured “When Violating the Law”—Criminal Act
2 or Trespass Only. Whether a violation of law within the mean-
ing of a policy of insurance providing for non-liability in case
the insured is killed or injured “when violating the law” must
be criminal or may be a mere naked trespass to which no crim-
inal consequences attach, *quaere*.

INSURANCE: Policy Payable Through Assessments—Remedy
3 Available. An action in equity is the only available remedy
to enforce the payment of a policy of insurance payable through
assessments.

APPEAL AND ERROR: Appeal for Delay Only—Taxation of Pen-
4 alty. An appeal manifestly taken in order to delay payment of
the judgment will be penalized by an award of damages. In
instant case, five per cent. of the judgment is awarded. (Sec.
4141, Code, 1897.)

Appeal from Marshall District Court.—HON. C. G. LEE,
Judge.

TUESDAY, MAY 18, 1915.

REHEARING DENIED SATURDAY, SEPTEMBER 25, 1915.

ACTION on a certificate of insurance resulted in a decree
as prayed. The defendant appeals.—*Affirmed.*

Boardman & Lawrence, for appellees.

Bradford & Johnson, for appellant.

LADD, J.—Francis P. Fredenhagen became a member of the defendant association November 6, 1911. He was on his way to the depot at La Grange, Ill., and, in undertaking to pass over a stile in the fence along the tracks, fell. This fence was made of pickets, and at this place there was an opening and two or three pieces of 1x2 or 2x4 were nailed crossways, so that one might step on these in going over. As he stepped on one of them and swung his foot over to go down on the other side, the piece on which his foot rested gave way, precipitating him on the track, where his legs were run over by an approaching engine and caboose. He died the same evening. This passage had been commonly used by the public for many years. He was in good standing in the defendant association, and in this action, the administrators seek to recover an indemnity provided in Sec. 2 of Art. 6 of the by-laws of the association, which provides that “Whenever a member in good standing shall, through external, violent or accidental means, receive bodily injury which shall, independent of all other causes, result in death within 90 days from said accident, the beneficiary named in his application for membership, or his heirs if no beneficiary is named therein, shall be paid, within 90 days after the receipt by the association of proof satisfactory to the board of directors of said injuries and of the accidental cause thereof, the proceeds of one assessment of \$2.00 upon each member in good standing, but in no case shall such payment exceed the sum of \$5,000, which shall be paid in full satisfaction of all liability to said deceased member, his beneficiary, heirs or legal representatives, and shall be in lieu of the weekly indemnity due to said member.”

I. It is not questioned that death was occasioned through violent and accidental means, but defendant contends that inasmuch as, by the contract, defendant was not to be liable if the assured was killed “when violating the law,” there can be no recovery. *Matthes v. Assn.*, 110 Iowa 222. This is on the theory that the common law was in force in Illinois, and therefore, in going through the fence onto the railroad

1. INSURANCE:
accident in-
surance: non-
liability “when
violating law”;
trespass.

tracks, defendant was committing the crime of trespass. At common law, however, a mere trespass on the land of another was not an indictable offense, and the injury, if any, could be redressed only in a civil action. To constitute a criminal offense, the act must have amounted to a breach of the peace, or have had a tendency to break the peace. Bishop's New Cr. Law, Secs. 538, 539; 2 McClain's Cr. Law, Sec. 823. As said in *State v. Mills*, 104 N. C. 905, "To constitute the offense of forcible trespass, there must be either actual violence used, or such demonstration of force as was *calculated* to intimidate or alarm or involve or tend to a breach of the peace. *State v. Pearman*, 61 N. C. 371. The show of force must be such as to create a reasonable apprehension in the adversary that he must yield to avoid a breach of the peace." The very gist of the offense is said to be the high-handed invasion of the actual possession of another. See *Com. v. Taylor*, 5 Binn. (Pa.) 277; *Henderson v. Com.*, 8 Gratt. (Va.) 708. It is manifest that even though crimes at the common law are punishable in Illinois, there was no offense in the instant case.

There is a conflict in the authorities as to whether the violation of law to constitute a defense must have been criminal, as was held in *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen (Mass.) 308, or might be merely a trespass against property or other infringement of civil rights to which no criminal consequences are attached, as held in *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478 (49 Am. R. 469). See also *Travelers' Ins. Co. v. Seaver*, 19 Wall. 531 (22 L. Ed. 155). But as the point has not been argued, we do not decide it, and merely pass on the issue of fact by saying that there was no proof of deceased's having trespassed on the railroad property. The evidence that the stile had existed since the construction of the fence and had been made use of every day for 10 or 12 years, in passing to and from the depot by the public generally having to go that way, was

2. INSURANCE:
injured "when
violating the
law": criminal
act or tres-
pass only.

undisputed, and conclusively established the existence of a license on the part of the railway company to pass by that route to and from the depot. This being so, the deceased, in going by way of the stile, was not a trespasser, and therefore he was not violating any law, civil or criminal.

II. The obligation of the association to levy on its members assessments, and pay the proceeds to the beneficiary, disposes of the defendant's contention that the cause should

have been transferred to the law side and tried to a jury. *Rambousek v. Supreme Council*, 119 Iowa 263; *Frank v. Assn.*, 151 Iowa 684. If the petition was not as specific

3. INSURANCE:
policy payable
through as-
sessments:
remedy avail-
able.

as it might have been, no objection was interposed, and the answer clearly showed that the only remedy available was in equity. There was no error, then, in overruling the defendant's motion to transfer to the law side of the calendar.

III. The plaintiff moves that damages be assessed against the defendant under Sec. 4141 of the Code, providing that the court, "if satisfied by the record that the appeal was

taken for delay only, may award as damages a sum not exceeding 15 per cent." on the judgment. Incurring the costs by taking appeal, such as the printing of the abstract and

4. APPEAL AND
ERROR: appeal
for delay only:
taxation of
penalty.

arguments and the liability for the printing of the argument of the appellee, is a strong circumstance tending to show good faith, but not conclusive. *Ragan v. Day*, 46 Iowa 239. If it were reasonable to suppose that counsel had been mistaken in the points raised on the appeal, the defendant should be given the benefit of the doubt, but counsel for the defense are learned and experienced lawyers and it is inconceivable that they seriously interposed the defense heretofore discussed. The only explanation is that the appeal was taken for the purpose of postponing payment, and we are of the opinion that the case is a proper one for the assessment of a penalty, as authorized by the statute. Accordingly, a penalty

of 5 per cent. is assessed against the defendant as a part of the judgment.—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

ANNA SIMMONS et al., Appellants, v. WESTERN LIFE INDEMNITY COMPANY, Appellee.

APPEAL AND ERROR: Exception to Ruling—Basis for Appeal.

1 No exception reserved, no appeal.

PRINCIPLE APPLIED: Plaintiff (1) filed his petition, (2) suffered an adverse ruling on demurrer, (3) reserved no exception, (4) amended over, (5) suffered a second adverse ruling on demurrer, (6) again failed to reserve any exception, (7) again pleaded over by filing an amended and substituted petition, which (8) was stricken from the record, (9) for the third time failed to reserve any exception, (10) filed another amended and substituted petition which (11) simply restated in new phraseology the matters theretofore pleaded, and which latter pleading (12) was stricken from the record on motion. An exception was reserved to the last ruling and to the entry of judgment. *Held*, the pleader had succeeded in making a record from which no appeal would lie.

PLEADING: Discredited Pleading Under New Phraseology—Effect.

2 Dressing up an old, discredited and successfully assailed pleading in new phraseology and refileing it cannot have the effect of giving to such pleading any new or added standing.

PRINCIPLE APPLIED: (See under No. 1.)

LIMITATION OF ACTIONS: Fraud—Knowledge—Ordinary Dil-

3 **gence Required—Insurance Policy.** An action for relief on the ground of fraud is barred after the lapse of five years (Sec. 3447, Par. 6, Code Sup., 1913) from the time the fraud was (a) actually discovered or (b) ought to have been discovered by the exercise of ordinary diligence.

PRINCIPLE APPLIED: A life insurance policy holder was induced to surrender his policy and to accept a new form of policy in lieu thereof. The policy holder retained the new policy in his possession, and maintained his membership, for over

five years, and up to the time of his death. Over two years after his death, his beneficiaries sought to have the old policy reinstated and to recover thereon, on the ground that the new policy was much more favorable to the insurer and much less favorable to the beneficiaries than the old policy, and that the surrender of the old policy was secured through the fraud of the insurer. *Held*, the policy holder would be presumed to have known, during all the intervening years, of the terms of the new policy, and that the action was barred.

Appeal from Cass District Court.—HON. E. B. WOODRUFF,
Judge.

WEDNESDAY, SEPTEMBER 29, 1915.

ACTION in equity to reinstate a certificate of life insurance alleged to have been surrendered or exchanged, and to recover the amount of indemnity therein provided for. A demurrer to the original petition having been sustained, and an amended and substituted petition having been stricken from the files, the plaintiffs appeal.—*Affirmed*.

Wm. L. Barnum, Jr., and C. R. Clovis, for appellants.

Thomas J. Graydon, E. H. Crocker, Thomas B. Swan, Tourtellot & Donnelly, and Barnes & Chamberlain, for appellee.

WEAVER, J.—The force and effect of the rulings of which appellants complain will be more readily understood if we preface their discussion with the statement of certain facts alleged in the pleadings and conceded in the argument. In the year 1886, Johnson H. Needles became a member of the defendant life insurance association, receiving a certificate of membership by the terms of which, in the event of his death while still in good standing in the association, certain benefits were to be paid to his beneficiaries. In the year 1903, the association, for reasons not necessary now to discuss, adopted the plan of taking up the outstanding certificates of membership and issuing others in lieu thereof, so far at least as the

assent of the individual members to such exchange or substitution could be procured. Needles, after correspondence with the defendant, delivered up his original certificate and received a new one in its stead, retaining the same until he died, on January 25, 1908. The plaintiffs herein are the children and grandchildren of Needles and are the beneficiaries of the insurance, if any is recoverable. In this action, which was begun March 21, 1910, they make no claim of right to recover upon the new or substituted certificate, but base their demand entirely upon the one originally issued. In support of this demand, they allege that the indemnity provided for by the new certificate was much less valuable than that which was assured to the beneficiaries by the old certificate, and that Needles was deceived and misled with reference thereto by the fraud and misrepresentations of the association, its officers and agents; and because of such deception they pray a decree holding the substituted certificate for naught and establishing their right to a recovery upon the original certificate, and that they have judgment accordingly. To this petition, the defendant demurred on the grounds: (1) that a defect of parties appears in the failure to make the administrator of a deceased heir of Needles either plaintiff or defendant; (2) that the facts stated do not entitle plaintiff to the relief demanded; and (3) that the facts stated show that the alleged cause of action is barred by the statute of limitations, and is also barred by the time limitation of six months stipulated for in the contract of insurance. On October 7, 1911, the demurrer was sustained generally. On November 8, 1911, plaintiffs filed an amendment to their petition, bringing in new parties, restating their allegations of fraud and misrepresentation by the defendant in procuring the exchange of certificates, and alleging that knowledge of the fraud was not obtained by plaintiffs until November 1, 1909. They further allege, in substance, that, by the acts of the defendant with reference to the exchange in policies in the year 1903, said association repudiated its obligation upon

said contract of insurance, and that such repudiation and abandonment of its contract did not become known to Needles or his beneficiaries, "except partially," until December 12, 1905. Upon the filing of this amendment, defendant moved for a more specific statement of the facts as to the alleged fraud and the persons by whom the false representations were made. This motion having been sustained, plaintiffs, on November 28, 1911, again amended their petition. To the amended petition, defendant again demurred on the grounds: (1) that the right of action, if any, is in favor of the administrator of Needles' estate; (2) that the facts stated do not entitle plaintiffs to the relief demanded; and (3) that the right of action is barred both by the statute of limitations and by the limitation provided for in the contract. On May 6, 1912, this demurrer was also sustained generally. On July 25, 1912, plaintiffs once more filed an amended and substituted petition, alleging substantially as before, but with somewhat greater particularity, the issuance of the original certificate and the fraud and deception by which Needles was induced to surrender the same and accept the substituted certificate. The defendant thereupon moved to strike the last amended and substituted petition because (1) it was filed without leave of court; (2) plaintiffs had already filed their petition followed by numerous amendments and substitutes to which demurrers had been sustained, and to permit further amendment and substitution would be an abuse of discretion; (3) the pleading so filed is sham and frivolous; and (4) upon the ruling of the court sustaining the demurrer to the prior substituted petition, plaintiffs' counsel had announced their purpose to stand upon their pleading and their refusal to further amend the same, and for that reason, the right to make further amendment could only be exercised by leave of court. Subject to the motion to strike, defendant further moved for more specific statement of the plaintiffs' allegations of fraud. On February 10, 1913, the court sustained the motion to strike. On December 29, 1913, the plaintiff

once more filed an amended and substituted petition which they describe as being "in lieu of all other pleadings." The pleading so filed is a restatement of the various allegations made in the prior petitions, amendments and substitutes. Defendant at once returned to the attack with a motion to strike the pleading last mentioned because (1) it was filed without leave; and (2) it was a mere repetition of the allegations of the pleadings against which demurrers and motions to strike had already been sustained, and to permit this amendment or substitute to stand would be an abuse of discretion. On February 12, 1914, the trial court sustained the motion to strike, with leave to plaintiffs to amend within thirty days. To this ruling, the plaintiffs excepted and elected to stand upon the record as made. Judgment was thereupon entered against plaintiffs for costs.

It will be seen that when the final ruling was made the action had been pending for some four years, during all of which time plaintiffs had been engaged in a more or less con-

stant effort to state a case which would successfully pass the test of demurrer and motion to strike. The appeal as stated in the appellants' abstract is from "both orders sustaining demurrers, from orders on motions to strike and from judgment." It appears, however, from the amended abstract, upon which no issue has been taken, that no exception was preserved to any of the rulings so mentioned, except the final ruling striking the last amended and substituted petition, and to the entry of judgment; and it further appears that each ruling, except that upon the last motion to strike and the entry of judgment, was acquiesced in by the plaintiffs, who, in each instance, proceeded to plead further by way of amendments and substitutes. The net effect of the record, as we have outlined it, is that the one material question for our consideration is upon the ruling by which plaintiffs' last amended and substituted petition was stricken from the files. Without taking time to discuss other phases of this question,

1. APPEAL AND
ERROR: excep-
tion to ruling:
basis for
appeal.

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it is sufficient now to say that, if the prior rulings sustaining demurrers and motions to strike were correct, or if plaintiffs had acquiesced therein by failure to except and by pleading over, then such rulings, until recalled or set aside by the court, became the law of the case; and there was no error in striking a substituted pleading which did no more than replead the very same matter which had already been held insufficient to sustain an action. That such is the case presented by this record is, we think, very clear.

We cannot properly prolong this opinion to recapitulate the allegations of the several pleadings, amendments and substitutes. They are exceedingly prolix and their more particular rehearsal at this time would be of no material aid to an understanding of the merits of the appeal. It is enough to say that we have with care compared the allegations of the last substituted petition with the pleadings which it was intended to supersede and find no material difference between them. So far at least as concerns the question whether there is any sufficient allegation of fraud on the part of the defendant and whether right of action thereon is not barred by the statute of limitations, the pleading stricken contains no new or additional statement of material facts of any kind. For this reason, if for no other, the ruling is correct.

It is true, as contended by appellants, that the party against whom a demurrer has been sustained may, as a matter of right, amend or substitute his pleading without formal

leave therefor, provided the amendment or substitute is so drawn as to avoid the grounds of demurrer which have been sustained by the court. But it is not proper for him to simply rewrite in form or substance the matter of the pleading which has been successfully assailed, and refile it. Labelling such a pleading as an "amendment" or "substitute" will not give it standing, and it will be stricken upon motion of the opposing party. *Epley v. Ely*, 68 Iowa 70;

2. PLEADING :
discredited
pleading under
new phrase-
ology : effect.

Waukon v. Strouse, 74 Iowa 548; *Grand River v. Switzer*, 143 Iowa 9.

The striking of the last pleading left the case standing as if such pleading had never been filed. *Bank v. Colton*, 143 Iowa 359. In other words, the case then stood with demurrer to the original petition sustained, demurrer to amended petition sustained, and the first amendment and substituted petition stricken from the files, with no exceptions preserved to any of these rulings. It is obvious that upon such record, an appeal cannot be sustained.

II. Even if this point be waived and we should treat the merits of the plaintiffs' pleading as being properly presented in this court, we should still be constrained to hold

3. LIMITATION OF ACTIONS :
fraud : knowledge : ordinary diligence required : insurance policy.

that the demurrer thereto was properly sustained, because the facts pleaded show beyond doubt that the alleged right of action is barred by the statute of limitations. It is disclosed by the plaintiffs' own allegations

that the negotiations between the association and Needles were closed and the exchange of certificates completed in January, 1903, and that Needles, with the certificate in his possession, retained it without objection during the remainder of his life, a period of more than five years, and this action by his heirs and beneficiaries was not begun for more than two years after his death. The essence of the plaintiffs' charge of fraud is that, by false representations and deceit on the part of defendant, Needles was induced to accept a new certificate which relieved the insurer from certain liabilities and obligations provided for in the first one and made the indemnity and benefits so provided for distinctly less valuable to those entitled to receive them. If this be true, the difference between the certificates must have been instantly discoverable upon a reading of the paper which Needles received in the exchange. There is no allegation, nor could it well be made, that he never read the certificate or that he did not know exactly what the new contract provided. The pre-

sumption is that he did know and if, after holding the certificate in his own hands and maintaining his membership with reference to such contract for more than five years, he had in his lifetime brought an action to set aside the transaction and restore his original certificate, simply because he then discovered or claimed to discover that the stipulations of the new one were less favorable to his beneficiaries than the former, the court would not permit him to escape the effect of the statute of limitations by saying he had not read and did not know the terms of the instrument or did not understand the meaning or import of its unambiguous language. And if *he* could not have maintained the action in his lifetime, then assuredly the plaintiffs, who acquired no interest in the insurance until his death, stand in no better position. There is no allegation that any trick or fraudulent device was employed by the defendant to prevent Needles from reading or becoming acquainted with the provisions in the certificate which he had accepted. The statute begins to run not merely from the actual discovery of the alleged fraud, but from the time when it might have been discovered by the use of the ordinary diligence and attention which the average man employs in the care and conduct of his business affairs. *Humphreys v. Mattoon*, 43 Iowa 556; *Nash v. Stevens*, 96 Iowa 616, 618; *McDonald v. Bank*, 123 Iowa 413, 420; *Bass v. James*, 83 Tex. 110.

Even constructive notice by public record has often been held sufficient to set the statute in motion. How much stronger, then, the reason for the rule that one is presumed to have knowledge of the contents of a written contract into which he has entered and which he has held in his personal possession and control for a long series of years without objection or complaint! This is certainly true in the absence of any charge or showing that his failure to know the terms of the contract in his hands has been brought about or induced by the fraudulent act or device of another. There is no allegation in the petition or in the substitute of any fact which

would operate to toll the statute, and the pleading clearly shows the alleged right of action to be barred.

We need not go into the other question discussed by counsel,—whether, even in the absence of such bar, the plaintiffs have charged facts constituting an actionable fraud, of which, to say the least, there is room for very grave doubt. For reasons already stated, the appeal cannot be sustained and the ruling and judgment appealed from are—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

C. W. DAY, Appellant, v. SOL DYER et al, Appellees.

ACTION: Law and Equitable Issues Combined—Transfer to Equity

1 —**Waiver of Trial at Law.** When, in an action involving law and equitable issues, the equitable issue is properly on trial before the equity court and *may* be determinative of the entire controversy, a motion, made before the close of *all* the evidence, to separate the issues and for a law trial on the law issue, is premature and, such motion being overruled, a failure to renew it at the close of *all* the evidence works a waiver of any objections to the entire case being tried to the court.

PRINCIPLE APPLIED: Plaintiff brought his action at law, presenting the simple law proposition that defendants had wrongfully torn down and removed plaintiff's barn. Defendants claimed the barn was personal property and belonged to them. During the trial, plaintiff amended and shifted his position by setting up a deed to the land from defendants and planting his right to damages on the covenants of warranty. Defendants countered with a pleading that the insertion of the covenant was by mutual mistake of the parties, prayed reformation, and moved that the equitable issue be transferred to the equity calendar. This motion was sustained. At the close of defendants' evidence on the equitable issue, plaintiff moved that the issues be separated and, if reformation was denied, to transfer the law issue on damages to the law calendar for trial. Motion was overruled. Plaintiff then introduced his evidence on the equitable issue, but did not again renew his said motion. The court denied reformation but decided the entire matter by holding that the barn was personal property. *Held*, the motion was prematurely made and the failure to renew it at the close of all the

evidence worked a waiver of the objection to the court's trying the entire case.

TRESPASS: Basis for Recovery—Shifting Ground. One cannot recover damages on the theory of a trespass when his claim is distinctly based on another ground, to wit, a breach of warranty.

ACTIONS: Law and Equitable Issues Intermingling—Equitable Controlling—Trial by Court. An equitable issue, even though injected by defendant into an action originally brought at law by plaintiff, if determinative of the entire controversy, is full justification for the court's determining the entire matter on such equitable issue.

PRINCIPLE APPLIED: (See under No. 2.)

REFORMATION OF INSTRUMENTS: Mutual Intention Frustrated Through Mutual Mistake—Sufficiency of Showing. Mutual mistake frustrating mutual intention establishes right to reformation.

PRINCIPLE APPLIED: Defendants Seibers conveyed land to plaintiff. Later, a barn was removed from the premises by one Dyer who claimed the barn was his personal property. Plaintiff sued the Seibers for damages under the covenants of warranty of his deed. Defendants pleaded mutual mistake in inserting the covenants and prayed for reformation. The farm once belonged to an estate and was passing through partition. Both plaintiff and defendants desired a part of the land. The referee desired to avoid the making of two deeds. The three agreed that the referee would report that he had sold all the land to defendants and deed accordingly, and then defendants could deed to plaintiff the portion going to him. This was done. Plaintiff and defendants, separately, paid the referee for their respective portions, but defendants received deed to all and then deeded to plaintiff the portion going to plaintiff. In this deed, the ordinary covenants of warranty were inserted, followed by the words "claiming by, through, or under us," which clause was inserted by the notary in the notion to make it a special warranty, and to carry no greater title than was carried by the referee's deed. The referee told plaintiff he was not selling the barn and that Dyer claimed it. In truth, neither party expected the deed to carry the barn. *Held*, reformation should have been granted.

Appeal from Boone District Court.—HON. R. M. WRIGHT.
Judge.

THURSDAY, APRIL 8, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

THIS action was brought at law by plaintiff to recover the value of a certain barn on the premises of appellant, which was torn down by the defendants and moved off plaintiff's land about February 10, 1912. The petition alleged that defendants acted wilfully, and plaintiff asked exemplary damages also. Trial was commenced to a jury and, after plaintiff had rested, the defendants filed an amendment to their answer, setting up an equitable issue, claiming that the warranty in the deed from the two Seibers to plaintiff did not express the true contract, and asking that the same be modified in form by reason of mutual mistake; that the court decree that the defendants made no covenants to the plaintiff as expressed in said deed; that a reservation of the barn in controversy be added to the same, and asking a reformation of the deed. Defendants moved to transfer the equitable issues presented by the amendment, and the motion was sustained; a transfer was had for such purpose to the equity side. We assume that the jury was discharged, although the record does not so show. This transfer was made on October 8, 1912, and up to that time, the hearing had been before Judge Albroom. Later, and on November 27th, the cause came on for trial before Judge Wright. At the close of the evidence of defendants, plaintiff moved to separate the trial of the issues of this cause into two parts, and moved the court to first hear and determine the question as to the reformation of the deed, and then, if the reformation of the deed is denied, that the issue as to damage caused by the removal of the barn be determined as a law issue. This was resisted by defendants on the ground, among others, that the court could not

then split the case up and compel the parties to be to the expense of two separate trials. Plaintiff's motion was denied. Plaintiff then offered his evidence in rebuttal. By its final decree, the trial court found that the barn in question was personal property, and that plaintiff had notice of that fact, and that, therefore, plaintiff was not entitled to recover. The court also found that defendants were not entitled to a reformation of the deed, and dismissed the equitable issue presented by the amendment to the answer. The costs were taxed to plaintiff, subject to prior orders in reference to costs. Both parties have appealed.—*Affirmed.*

Goodykoontz & Mahoney, for appellant.

Whitaker & Snell and *D. G. Baker*, for appellees.

PRESTON, J.—Plaintiff, having first perfected his appeal, is the appellant. The appellant and appellees have each filed an abstract setting out the evidence and proceedings on each appeal. Though largely questions of fact are presented as to the merits, we shall not attempt to set out the evidence at any length. It would be impracticable to do so. Twenty-eight pages of the abstracts are taken up with printing the pleadings and the several amendments thereto.

1. We shall first refer to the point made by plaintiff and the alleged error in overruling his motion to separate and try some of the issues at law. It will be necessary to refer more in detail to the pleadings and the state of the record at the time of the ruling by Judge Albrook to try the equitable issues as in equity, and the ruling of Judge Wright, at the conclusion of the evidence of defendants, on plaintiff's motion to separate and try some of the issues at law.

The petition alleged that plaintiff was the owner of the real estate described, but did not refer to or set out his

warranty deed from the two Seibers. The Seibers filed a separate answer, in which they admitted that plaintiff was, on February 10, 1912, the owner of the premises described in his petition, but denied that he was the owner of all the buildings thereon; alleged that, at a time prior to the time that plaintiff became the owner of the premises described in his petition, one General Huffman owned five acres square south of the other one hundred and twenty acres purchased by plaintiff and, while the owner of said premises, said Huffman erected near his south line a barn and other improvements; that if any part of said buildings were located across the south line of said premises then owned by said Huffman, the same were so erected with the knowledge of the then owner of said premises now claimed by plaintiff, and with the express agreement with said owner, verbally made, that said Huffman might erect said buildings across his south line on the adjoining premises, and that he might have the right to remove the buildings at any time; that said agreement was with the mother of said Huffman, who was then the owner of the premises south; that afterwards said General Huffman sold the five acres to defendant Dyer, including all the buildings erected south of his south line upon the premises of Huffman's mother; that afterwards, and in 1912, defendant Dyer sold said five acres to the Seibers, and also what buildings there were erected by General Huffman south of the line, and particularly the barn which plaintiff claims defendants tore down; that the Seibers were the owners of the barn, and that the same was never the property of plaintiff; was never a part of the real estate of plaintiff, but was personal property; and that plaintiff had full knowledge and notice of that fact when he purchased the land. Substantially the same matters were set up by defendant Dyer in his separate answer. Amendments were filed to the petition and the answers, setting up matters not material to the point being now considered.

1. ACTION: law
and equitable
issues com-
bined: trans-
fer to equity:
waiver of trial
at law.

On October 7, 1912 (abstract states that it was in 1913), and during the trial, or that part of it which was had before Judge Albroom, plaintiff filed an amendment to his reply, in which he set up a copy of the warranty deed to the premises described in plaintiff's petition, and alleged that the premises were conveyed to plaintiff without reservation, and that defendants are estopped to assert as against plaintiff anything in derogation to the recitals thereof; and at the same time plaintiff filed an amendment to his petition, alleging that he became the owner of the premises by warranty deed from the Seibers. This deed was executed in 1911.

The cause then proceeded to trial on October 7th and 8th, 1912, before Judge Albroom, and a jury was impaneled; after the testimony of plaintiff had been offered, defendants filed an amendment to their answer, setting up the equitable matter before referred to. This amendment recited that it was made at the close of plaintiff's evidence, and upon the introduction of the warranty deed; alleged that the deed did not state the true contract and agreement; that in truth the Seibers made no covenants of warranty as expressed in the deed; that the Seibers did not convey all the land named in the deed to the plaintiff, but that at the time the conveyance was made, there was pending an action in partition entitled *Huffman v. Huffman et al.*, in which a decree had been entered ordering the partition of the land named in the deed, and other lands, by the sale of the same; that one Crooks was appointed sole referee to sell; that before said deed was made, Crooks, as referee, agreed to sell to plaintiff the land described in the deed, and agreed to sell to defendants, the Seibers, the balance of the real estate so partitioned; that the referee desired to report only one sale and not make two referee's deeds, and that he induced the Seibers to take a referee's deed to all of said premises, but to become in fact, the owner of only a part of it, and that plaintiff receive a deed from the Seibers for the portion he had purchased from the referee, which was done; that defendants, the Seibers, received no

consideration from the plaintiff; that the purchase price was paid to the referee, and not to defendants; that the deed was only made to accommodate and assist plaintiff in purchasing the premises of the referee; that prior to the execution of the deed, it was known by the referee and by plaintiff and defendants that the barn in question was only upon the premises by sufferance, and that the same was the property of Dyer.

Plaintiff moved to strike the amendment because filed too late, and because irrelevant to the issues as made. This motion to strike was overruled. The defendants' motion to transfer the equitable issues presented by such amendment was then sustained, and the transfer was made for such purpose, as recited in the order set out in the abstract. To this order, the plaintiff excepted.

On November 25, 1912, and nearly two months after the ruling transferring the equitable issues, plaintiff filed a reply to this amendment, denying that defendants were entitled to a reformation or modification of the deed. On November 27, 1912, the hearing was taken up before Judge Wright.

It will be observed that there was no occasion for the defendants to plead a reformation of the deed until plaintiff had set up the deed in his reply, and had amended his petition in that respect; this deed was so set up during the trial before Judge Albroom.

The defendants' amendment to answer did set up equitable issues, and, so far as such issues were concerned, it was proper for the trial court to transfer such issues to the equity side, and this is all that was done. The order does not purport to transfer the entire case, as we understand it. The plaintiff's exception was only to the order transferring the equitable issues, and, as stated, the order was proper at that time and to that extent, so that the exception thereto would not be well taken. After defendants had put in their evidence on the equitable issue, but before plaintiff had introduced his evidence in rebuttal on that point, plaintiff made his motion to separate the issues, which has been heretofore referred

to. The motion was overruled, and the parties proceeded to, and did, put in all the evidence. After the evidence was all in, plaintiff made no further request for a separate trial of the legal and equitable issues. At the time the motion was made, it could not be determined whether defendants' equitable issue would be sustained or not. If it should be, it would end the controversy, and there would have been no occasion for a trial of the law issue.

It seems to the writer that, under the peculiar situation shown by the record in this case, there was no error in overruling plaintiff's motion; that the motion was premature, and that plaintiff waived any objection he might have had to the entire case being tried to the court by not objecting and without renewing his motion when the evidence was all in, and when the issues raised by the defendant in its equitable answer could be determined. As bearing somewhat upon this proposition, see *Kamrar v. Butler*, 164 Iowa 293.

Appellant at this point cites and relies on Code Sec. 3434 and the case of *Fisher v. Trumbauer*, 160 Iowa 255. The statute referred to provides, in substance, that where plaintiff has adopted the wrong proceedings, the defendant may have the correction made by motion at or before filing answer. In the *Fisher* case, plaintiff brought his suit in equity. The equities were not proven, and the trial court dismissed the cause and relegated the parties to an action at law. This was held to be error because Sec. 3432 of the Code provides that an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings and a transfer to the proper docket. In the present case, the trial court did not dismiss the action, but did proceed to determine the entire matter.

In certain cases, the proof rather than the allegations in the pleadings control, as stated in *Fisher v. Trumbauer*, *supra*. Even though this be true, when the proof is all in,

nevertheless the pleadings must control up to a certain stage in the trial.

We agree with the trial court that the weight of the evidence shows that, as between plaintiff and defendants, the barn was personal property. The evidence is without substantial dispute, we think, that the barn, when built, was personal property as between Huffman, who built the barn, and his mother, the owner of the land; and it is undisputed that the Seibers, plaintiff's grantors, had full knowledge of that fact. If plaintiff is bound by such knowledge, then, even though the case had been tried at law, or to a jury, the court would have been compelled to direct a verdict. In such a case, there would be no prejudice in failing to separate the law issue and try that on the law side of the calendar. *Slaughter v. McManigal*, 138 Iowa 643, at 650.

There may be some conflict in the evidence as to whether plaintiff himself had notice of the character of the barn as to its being personal property. Whether such notice is required, we do not determine. The only debatable proposition in regard to plaintiff's motion to separate the issues is whether there was such a conflict in the evidence as to entitle plaintiff to a trial at law, or to a jury, had a jury been demanded.

2. It is further said in argument by plaintiff that, even if it be conceded that he was charged with notice as respects the barn and its character as personal property, yet such fact

2. TRESPASS :
basis for re-
covery : shift-
ing ground.

would not justify defendants in wilfully destroying the barn; that acts of trespass cannot be avoided under a claim of right. It is a sufficient answer to this to say that plaintiff did not sue for trespass. In the petition, plaintiff asked to recover for the value of the barn, also for exemplary damages, doubtless on the theory that defendants acted wilfully. But they state in argument that, under the record, they do not claim to recover anything but the value of the barn, which they say

is \$250.00. The defendants, or some of them, claimed all the time to own the barn and the right to remove it.

3. We are satisfied from the evidence and the entire record that the trial court reached a just conclusion, but we should have placed it upon another ground. The equitable

issue tendered by the defendants, if determined in favor of defendants, would have ended the controversy. It is possible, as suggested by defendants, that the trial court, having found against the plaintiff in holding

that the barn was personal property, may not have considered it necessary to investigate as carefully the equitable issue tendered by the defendants. However this may be, we think that, where legal and equitable issues are tendered in the same action, and the equitable issue would end the controversy, the trial court might very properly exercise the broader equitable powers and determine the case on that ground, if the evidence is sufficient to sustain such issue.

We think the evidence in this case justifies a finding for the defendants as to the reformation of the deed. It is from a failure of the trial court to so find that the defendants have appealed. We may properly set out a part of the testimony on this issue. It appears that

George W. Crooks was appointed sole referee to sell a farm belonging to the Huffman heirs. The Seibers brothers owned some land adjoining the Huffman land and Dyer also owned five acres adjoining the same farm on the north. The Seibers were willing to purchase a part of the Huffman farm, but could not buy it all; the plaintiff desired to purchase a part of the Huffman farm, but not all of it. An agreement of that kind was entered into. The referee suggested to plaintiff and the Seibers that, to save making two referee's deeds, he report the sale of the entire farm to Seibers brothers, who would convey a part of the land to plaintiff. A survey was made and plaintiff paid the referee the agreed price

3. ACTIONS: law and equitable issues intermingling: equitable controlling: trial by court.

4. REFORMATION OF INSTRUMENTS: mutual intention frustrated through mutual mistake: sufficiency of showing.

per acre for the land he was to take, and a deed was made for the entire property to the Seibers, and on November 27, 1911, they made the deed in question to plaintiff. This deed recites that they were "lawfully seized in fee simple of said premises, that they are free of incumbrance, that we have good right and lawful authority to sell the same and we do hereby covenant to warrant and defend the said premises and appurtenances thereto belonging against the lawful claims of all persons whomsoever claiming by, through or under us." It is the claim of defendants that this was what they denominate an accommodation deed, and that there was no consideration as between the Seibers and plaintiff; that the money was paid to the referee. This deed was drawn by Mr. Crooks as a notary public, who was also the referee. Mr. Crooks testifies:

"My reason for writing after the warranty clause in this deed the words 'claimed by, through or under us' was that some persons think that a quit claim deed is not a deed sufficient to carry title and this would be called a special warranty. The object in that, the matter being understood between all the parties, and the purchase being made in the way it was, was that all that would be given would be a special warranty deed.

"Q. Was it your intention at that time in drawing up that deed, or from what Day had said to you and the Seibers brothers had said, that the Seibers brothers were to warrant the title to Mr. Day to this land?"

Over objection, he answered:

"No, it was not my intention, only to the extent of it carrying title to Mr. Day under the agreement to buy land according to their agreement.

"Q. Was it your intention in drawing that deed that Seibers brothers were to give Day any more title, or any

greater title, or any different title, than what they got by the Referee's deed from you?

"A. Nothing else than that, no.

"Q. Then, Mr. Crooks, this deed from Seibers brothers to Mr. Day was simply a form or formality that was gone through for the purpose of saving you making two reports of sale and two Referee's deeds?

"A. Yes, that is correct. As far as I knew from my knowledge of this transaction, the Seibers brothers did not receive any consideration whatever for this deed to Mr. Day. Not a cent, nor any property. It was during the negotiations that Mr. Day spoke to me about the barn, and I then called Mr. Day's attention to the fact that that barn was on there that belonged to Mr. Dyer. Mr. Day was in the office. I told him that Mr. Dyer had been in and spoke about the barn, and I told him I knew he was to have the barn for it did not belong, as I understood it, to the Huffman Estate, but it went out of my mind before that to say anything about it, and he wanted to know what about the matter of reserving it, and I said, 'The commission to me directs me to sell certain lands,' (describing them); that I didn't know that I would have any authority (as referee) to reserve anything in the matter of the barn, but as I understood it, it belongs to the person who owned the five acre tract. But it went out of my mind entirely, and we talked the matter over some, and he wanted to know if he bought it, what about the outcome of it, and I told him I didn't think it was a fixture. He wanted to know about it, and I told him, as I understand the law, that the barn was put there to be taken away, the party who placed it there had a right to remove it, and it wouldn't go with the sale unless they had been served with notice to remove it and failed to do so according to the notice, but he had better see Mr. Fry, who had procured the order for the sale of the land and see what he said about it. Subsequently he talked to Mr. Fry about it. This conversation was quite a while before I drew up this deed to plaintiff.

The matter hung along. As I have already said, we had as many as three conversations, and in each I explained to him, as I understood the matter, that I told him I was not selling the barn; I was selling the land described in the commission. He came back to me and said Mr. Fry had told him substantially the same as I had. I think the Seibers were close by when I had a talk with Mr. Day in reference to the barn. At the time I drew this deed from Seibers to plaintiff it had passed out of my mind in reference to the barn. If I had remembered about the barn at the time I had drawn this deed I would have put in there the reservation in reference to the barn."

Some of the evidence is objectionable, but it was not all objected to. There is enough competent evidence to show the true agreement between the parties.

One of the Seibers testifies,—and the other says he understood it the same way:

"We did not have any intention at the time I and my brother executed this deed to C. W. Day of the land conveyed in the deed that we would give him any title or right to the Dyer barn. At the time that we executed this deed to C. W. Day we did not claim to own any title or interest in this barn of Dyer's.

"Q. If you had known, Mr. Seibers, that this deed that Mr. Crooks prepared and you and your brother signed conveyed any title, or was an assignment or transfer of the barn across the line that was claimed by Sol Dyer, would you have signed the deed?"

Over objection, he answered, "No, sir."

There is other evidence of like import. Though plaintiff denies some of the statements of the witnesses for defendants, we do not understand him to claim that the parties intended or supposed that the barn went with the land which plaintiff was buying. He simply relies on his deed. In fact,

we understand plaintiff's contention to be, on the other branch of the case, that because there was no conflict in the testimony, and because defendants' own testimony was not sufficient to warrant a reformation of the deed, and the court could have so determined from defendants' evidence alone, therefore the motion to transfer or to try the law issues at law should have been sustained. We think it very clear from the entire record that it was not the intention of any of these parties that the barn in question should go with the land purchased by plaintiff, and that the deed does not express the true agreement. We find this doctrine laid down in the books: that whenever it clearly appears that a written instrument, drawn professedly to carry out the agreement of the parties previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by a mistake of the draughtsman, either as to fact or law, it fails to fulfil that purpose, equity will correct the mistake by reforming the instrument in accordance with the previous agreement. True, the mistake which may be thus corrected in such a writing must be mutual; that is, such a mistake in the draughting of the writing as makes it cover the intent or meaning of neither party to the contract. To entitle the party to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he seeks to have established, and that this intention was frustrated, either from some fraud, accident, or mutual mistake of the parties. *Stelpflug v. Wolfe*, 127 Iowa 192; *Goodrich v. Fogarty*, 130 Iowa 223; *Pyne v. Knight*, 130 Iowa 113; 2 Pomeroy's Equity, Sec. 870; 4 Pomeroy's Equity, Sec. 1376; Eaton on Equity, p. 275.

The trial court might well have placed his decision upon this ground, but the result is the same, and the judgment is —*Affirmed*.

DEEMER, C. J., LADD and EVANS, JJ., concur.

GEORGE DEGRAW, Appellee, v. BETTENDORF AXLE COMPANY,
Appellant.

MASTER AND SERVANT: Dangers, Obvious, Known and Appreciated—Failure to Warn—Assumption of Risk. Dangers obvious and known to and appreciated by the servant call for no warning from the master. Such dangers, incident to the work, are assumed by the servant.

PRINCIPLE APPLIED: A carpenter of 20 years' experience in all lines of carpentering had been sheeting a quarter-pitch roof. Snow, ice, sleet and frost were on the roof. He had worked under these conditions for some time. The work was stopped for two weeks. The weather was stormy, with snow falling. At the end of the two weeks, he was told generally, and without warning as to danger, to go upon the roof and, with other workmen, complete the sheeting. He had not seen the roof in the meantime, but had no reason to think it different than when he left it. He knew ice was to be expected on a roof in January. While getting nails from a keg on the roof preparatory for work, he slipped and fell through an opening in the roof which had not been sheeted. *Held*, the danger was obvious, known and appreciated; there was no duty to warn; and the danger, being incident to the work, was assumed by the servant.

Appeal from Scott District Court.—HON. M. F. DONEGAN,
Judge.

FRIDAY, JUNE 18, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION to recover damages for personal injuries. Trial to a jury and judgment for plaintiff for \$1,000. Defendant appeals.—*Reversed*.

Cook & Balluff, for appellant.

Helmick & Boudinot and *George W. Scott*, for appellee.

PRESTON, J.—The petition alleges that on January 14, 1913, plaintiff was in the employ of defendant as a carpenter and engaged in roofing a new foundry building; that on said day he was directed by a foreman of defendant to go upon the roof of said building with a fellow workman and complete the sheeting on said roof; that he had worked on said roof a number of days previous thereto, until inclement weather compelled the cessation thereof; that he went upon said roof and proceeded to comply with said order; that in the exercise of his duties, and while exercising due care, he went near a keg of nails, previously left on said roof for the use of workmen, and procured nails for the use of himself and the other workman; that, unknown to him, ice had formed upon the melting snow near the opening which they were about to sheet over, and on stooping to commence work, said ice caused him to slip and fall from the roof into said opening, his fall being arrested about eight feet down. Injuries were inflicted, the extent of which are not in dispute upon this appeal. The two grounds of negligence submitted to the jury by the trial court were as to whether defendant failed in its duty to furnish plaintiff a safe place in which to work, or failed in its duty to warn plaintiff of the dangers incident to working on the roof. The defendant introduced no evidence. At the close of plaintiff's evidence, defendant moved for a directed verdict, which motion was overruled. In the assignment of errors, appellant challenges the sufficiency of the evidence to show any negligence of the defendant. It is also said that the injury to plaintiff resulted from one of the dangers inherent in the business of a carpenter engaged in laying roofs in the winter time, which was open and obvious, and of which plaintiff assumed the risk. Some of the instructions are also complained of.

Because of appellant's contention that the evidence does not warrant a recovery, it will be necessary to refer to so much of it as bears upon the cause of plaintiff's injury, somewhat in detail. Plaintiff testified:

"I am forty years old; was employed by defendant as a carpenter and had been in their service from about June until January when I met with this accident. I did nearly all the roof work on the foundry building. The building was about as long as a city block, one hundred eighty or two hundred feet wide, and I think the peak was seventy feet high, and the eaves about forty feet high. I was engaged in sheeting that roof. We had nails on the roof for the roof already up there, sitting up on the roof in a keg. I think the work ceased around about two weeks before I got hurt. During that two weeks we had stormy weather, snow. Q. While you were working up there previous to being hurt, was there any snow or ice or sleet or frost? A. Why, yes, there was snow and ice on the roof and had been for two weeks ahead of that. There had been frost on the roof when I was working previous to the time I was hurt, and we had worked under those conditions. Millis was working with me the morning I got hurt. The morning of the accident, the foreman of the carpenters at the foundry told me—'You boys will have to go up there and put that roof on; the bricklayers have got done. We want to get that roof on right away to enclose the building. We will have to take and put the windows in before we take the scaffold down,' that is all the directions I had. In obedience to that order, I went up and started to put the roof on. I told Millis I would go up and get the nails, and I would nail the upper end on account that I had rubbers on and he didn't have any. I got the nails and put enough for him and me both in my apron and went to go down to handle my end and hand him his nails, and I slipped and fell. There was frost on the roof that I could see, and there was ice under the frost that I didn't see. I did not walk or proceed over the roof any different from what I had previously done. We had nails up there to finish up this roof. There was about half a keg of nails up there. We went up and I says, 'I will go up and get the nails,' because I knew where they were, and he says, 'All

right.' When I came back with the nails, then I slipped. I set the nails on a snow bank on top of the roof—a little drift of snow. I was at work about eight or ten feet from the opening. From there I slid down, eased myself down easy. By that, I mean as a general thing you get down on your knees and slide down until you get to where you want to work; you don't stand up and walk down; I sat down to get down to where I was going to work and hand him the nails, and of course I slipped off. We always had a ladder somewhere around before that, and I would walk down to where the ladder would stand. We always crept down to that ladder on the edge of the roof. I started to work on that roof about twenty minutes after nine in the morning, and I just got the nails to start to work and then I fell. It couldn't have been over ten minutes. On the morning I was hurt, I didn't know the condition of the roof. I hadn't been up, and I hadn't seen it or been near it. I did not have any reason to think it was different from what it was when I had worked there before. We had worked on it before with frost up there; whenever there would be frost up there the roof was bad, we had done lots of work up there with frost up there on the roof. I fell between twelve and fourteen feet and struck the crane beam; there was no scaffolding on the inside of the building; it was all outside. I fell on the inside."

On cross-examination, he testified:

"The building was a foundry, with a ventilation cupola on top. The roof was a slanted roof of twenty-four feet; there was a straight wall that rose up a certain distance higher and a plain gable roof on top of that. There was more than forty feet left to be covered, but that was all we got to on account of the brick work at that time. The bricklayers had got done with about that much. I mean there was a space of about forty feet north and south by ten feet east and west that had to be covered. We were putting ten-foot lengths on at that time at the lower edge. The fourteen-

foot lengths were already on. We were to cover a space ten by forty that morning. I have been a carpenter for about twenty years; have done pretty near everything in that line, building and house building, and I have helped put on a great many roofs in that time. This roof was about a quarter pitch roof. In the twenty-four feet, it would have a drop of six feet. It isn't a very steep roof. They build them steeper than that, and I have worked on them steeper than that. The sheeting in the roof was inch and a half matched stuff like flooring, and when they laid them up tight together there wasn't any cracks in the roof. The boards ran lengthwise up and down. That kind of roof didn't give me as good a foothold as boards laid for shingles, with cracks between them. I have lived in this vicinity since last May or June, and before that in Chicago nearly all my life; I had worked in a climate where ice and snow comes in winter time and I knew at the time of this accident that snow and ice were to be expected in the month of January. I knew that working on a roof in January there was apt to be both snow and ice on the roof at any time. That is peculiar to this climate. I knew that any time I was doing roof work in the winter time I might find slippery places by reason of frost and ice or snow. There was a scaffold on the outside seven feet wide and only four feet below the eaves, so the only place where I could fall any distance was to slip through the unfinished hole in the roof. I had no special orders when I went up there except to go up and finish the roof; that was all. I knew from the work I had done there previously how that roof was to be laid. The board would be driven into its tongue and groove until they came together and nailed. I would nail a board at the upper end and Millis would nail the lower end. It was pretty cold around January and we wore rubbers. I had a pair of what they call German socks and rubbers on them. When I got the keg of nails I set it down about eight or ten feet from the opening in the roof. I did not see more than frost on the roof, only this snow

and froze. There was snow in places; kind of little drifts along, little piles of snow on the roof. I knew from past experience that where snow melted in the winter time and froze again there was likely to be ice. I had left those nails up there myself previously. Before I got them, they were sitting back just on the old building. The keg stood above the opening. That is where I went to get them and got them and carried them back to where we were going to work. In order to do that, I walked over the slanting part of the roof that was already laid. I got the nails safely, and then I undertook to go down to where I was going to work. I crawled over the iron beam to get from the scaffold over to the fourteen-foot boards that were laid. I knew just how much of the roof had been finished before I went up. I knew that there hadn't been anybody up for around about two weeks. We had been working inside. Mr. Millis and I were the first ones to be sent up there after the lay off of two weeks. They had canvas where the two buildings came together so the snow wouldn't get in and cold air get on the moulders. This canvas was not where we were going to board."

Robert Happs testified:

"I was helping with the carpenter work at the time plaintiff got hurt. I was working for the defendant helping build scaffolding and nailing on roof and working around there. The snow was above where the roof was where plaintiff was working, right at the edge where he had come down to go to work on the roof, just a little above. I suppose he was going to nail right on the edge where I did and the snow and ice were right there alongside of it in places there. Q. Could you see the ice and frost? A. Oh, yes, you could see them; it was in a pile and a person could see that all right. Q. Was there frost on the ice? A. It was snow. It wasn't frost at all. It was snow. Q. On the ice? A. On the ice because it rained and sleeted and snowed that night and the

next day they went to work up on the roof. They went up there about ten o'clock. I noticed the place where Mr. DeGraw slipped. You could see where he slipped. There was ice and snow; there wasn't any frost. There was a heavy frost that morning. I suppose, snow and ice and sleet together, I should say. The ice and snow and frost at that time looked just the same as it always looked to anybody when they see it there on the boards."

Witness Brimmer testified he was working about twenty feet below plaintiff; that there was frost and ice and snow on the roof. This is the substance of all the testimony as to the condition of the roof.

The order to plaintiff and the others was general and simply designated work to be done by them, not an order given in the actual direction of the work. It is true, of

MASTER AND
SERVANT: dan-
gers obvious,
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ure to warn:
assumption of
risk.

course, as contended by his counsel, that plaintiff was not required to make an independent investigation, but may assume his employer had performed the duty required of it as to the condition of his working place, unless the defects and dangers were obvious and known and appreciated by him, and it is equally true that the defendant would have no right to send him into a place where there is hidden danger without warning; but, under the evidence in this case, there was nothing concealed or hidden. There is no duty of the employer to warn the employe of dangers which are obvious and known and appreciated by the employe. Here the evidence, without conflict, shows that the defect and the danger were obvious. The evidence of plaintiff himself, taken all together, so shows. True, he says in one place in his testimony that he did not know there was ice under the frost, but in another place he says: "I did not see more than frost on the roof only this snow and froze. I knew from past experience that where snow melted in the winter time and froze again there was likely to be ice."

He was an experienced carpenter, accustomed to working on roofs in the winter in this climate. He knew the effect of melting snow and freezing and that ice was to be expected. He had quit work on this same roof two weeks before because of bad weather. He knew there had been cold, stormy weather—snow—during that two weeks. He and Millis were the first ones to go up on the roof when work was resumed, and the plaintiff then saw for himself the frost, snow and ice on the roof where he was hurt and says it had been there two weeks before that time. His other witnesses also so say. Plaintiff was better informed as to the condition of the roof and the danger than his foreman or the defendant. Everything of which he could have been warned was known by him. As said by Mr. Justice Weaver, in *Kerlin v. Railway Co.*, 149 Iowa 440, 447: “So, too, if the danger to be apprehended in obeying the order is better known to the servant than to the master giving the order, or if the servant fully appreciates the nature and extent of the risk to which he is exposed, he is held to have assumed the risk.”

Other cases hold the same. Without further discussion, we think, under the evidence, there was no duty to warn, and that plaintiff, knowing the defects and danger, assumed the risk, and that this risk was incident to the work. Other questions are discussed, but we deem it unnecessary to notice them, because the conclusion we have reached decides the case.

The motion to direct a verdict should have been sustained. Other and different evidence may be produced on another trial, so that the cause is reversed and remanded.

DEEMER, C. J., WEAVER and EVANS, JJ., concur.

EMIL EDGREN, Appellee, v. SCANDIA COAL COMPANY,
Appellant.

MASTER AND SERVANT: Mines—Failure to Furnish Props—

- 1 **Miner Continuing Work—Statutorily “Safe”—Negligence per Se.** Whether a mine is “safe” within the meaning of our Mining Act, providing no miner shall work in his place “until it is made safe,” depends on the facts ascertainable by reasonable diligence *before* the accident, and not on the *later* developments of the accident itself. In other words, if a miner makes an examination such as a reasonably cautious miner would make and discovers nothing that such a miner would deem unsafe, then the place is “safe,” statutorily, and he may continue work, guiltless of negligence *per se*, even though an accident follows, demonstrating that in truth it was unsafe. (Secs. 2489-5a, 2489-16a, Sup. Code, 1913.)

PRINCIPLE APPLIED: A miner, injured by a fall of slate because of insufficient propping, had frequently requested, and had been promised, props, but operator had failed to deliver them. In the face of the statute he continued work, after proper examination. *Held*, he was not guilty of negligence *per se*—that he had not violated the statute.

MASTER AND SERVANT: Mines—Unpropped Roof—Miner Con-

- 2 **tinuing Work—Contributory Negligence per Se.** Evidence reviewed and held not to show contributory negligence on the part of a miner working in a partially propped room.

PRINCIPLE APPLIED: A miner's room ran north and south, was 100 feet long, 20 feet wide and some 4 feet high. A track was laid along west wall and some 5 feet therefrom. The roof was slightly lower on west side of track than on the east side, owing to a “roll” or “step down” in the slate roof. This “roll” was about on the line of the west rail. “Rolls” frequently are attended with “slips” or breaks in the continuity of the slate. There was evidence that this “roll” contained no “slip.” Some days before the accident, plaintiff requested the foreman to timber over his track because of the “roll.” Plaintiff propped the entire roof west of the line of this “roll,” and also the entire roof east of the track, except to within 35 feet of

the face, or north end. This 35 feet was partially propped by a row of props 3 or 4 feet apart, near the east rail. The rest of the area remained without props. Plaintiff repeatedly requested other props. Though promised, they had not been furnished. Plaintiff examined the roof, deemed it safe, pushed his car 35 feet south of the face and commenced to load from the west side of track. At this point, the roof was fully propped west of track, and the short row of props extended along the east side of car and 7 feet north of the car. The roof fell primarily from the unsupported roof but carried with it part of the supported roof. No fall came from west of the track. The break was along the line of the "roll."

MASTER AND SERVANT: Mines—Falling Roof—Failure to Furnish Props—Proximate Cause. When the roof of a mine fell because of the absence of props, the proximate cause of such fall may be deemed the mine owner's failure to furnish the props, it appearing that the miner had requested the props and would have installed them had they been furnished. (Secs 2489-5a, 2489-16a, Sup. Code, 1913.)

MASTER AND SERVANT: Mines—Failure to Furnish Props—Miner Continuing Work—Assumption of Risk. A miner, having requested the mine operator to furnish him props with which to prop the room in which he was working, does not, by continuing at his work, assume the risk arising from the operator's failure to furnish them. (Sec. 4999-a3, Sup. Code, 1913.)

MASTER AND SERVANT: Mines—Failure to Prop Roof—Injury—Facts Essential to Recovery. A miner seeking to recover for injuries received from the falling of the roof of his mining place by reason of insufficient props thereunder must show:

1. That he had requested the owner to furnish the props.
2. That the owner had failed to do so within a reasonable time.
3. That the owner's failure to furnish the props was the reason for his failure to prop the roof.
4. That upon "entering" his place of work, his first act was to diligently examine the said roof.
5. That the said examination revealed nothing to him that he deemed unsafe, and that he therefore believed it safe. (Secs. 2489-5a, 2489-16a, Sup. Code, 1913.)

MASTER AND SERVANT: Instructions—Contributory Negligence—Inadvertent Omission. An instruction, intended to cover the subject of contributory negligence, but inadvertently omitting the word "negligence," held insufficient.

APPEAL AND ERROR: Rulings Adverse to Winning Party—Review.

- 7 Rulings of the trial court, adverse to the winning party but not affecting the amount of recovery, will not be reviewed by the appellate court.

Appeal from Boone District Court.—HON. R. M. WRIGHT,
Judge.

SATURDAY, MARCH 13, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION for damages for personal injuries to an employee in a coal mine. The injury resulted from a fall of slate. The plaintiff thereby lost his left arm at the shoulder joint and the thumb and forefinger of his right hand. There was a verdict for the plaintiff. The defendant appeals.—*Reversed.*

John T. Clarkson and Stevens, Frye & Stevens, for appellee.

Parker, Parrish & Miller, and *C. Woodbridge*, for appellant.

EVANS, J.—The defendant is a corporation engaged in coal mining. The plaintiff was an experienced coal miner in its employ. The accident resulted from a falling roof which was insufficiently propped. The negligence charged against the defendant was that it failed, after repeated requests from the plaintiff, to furnish props for the propping of such roof. The defense interposed was a general denial and plaintiff's assumption of risk and contributory negligence. The accident occurred in the plaintiff's room or "place of work." The entry which immediately connected with this room extended east and west. The room extended from the entry toward the north. This room had been worked to a depth of 100 feet from such entry. It was about 20 feet wide, except at its south end, next to the entry, where it was only about 9 feet wide. As the miner's work progressed, a track

was laid in the room and extended from time to time. The course of this track was almost due north, bearing, however, a little east. It was laid 4 or 5 feet east of the west wall or "rib" of the room. The thickness of the vein was about 4 feet. The height of the room varied to some extent, because of a "roll" or "step down," in the slate which comprised the roof. By reason of this "roll," the roof was slightly lower on the west side of the track than on the east. This roll, when first uncovered at its south end, entered into the coal bed about 2 inches. As the room was enlarged toward the north by the removal of the coal, the roll became deeper, so that at the final north face of the room as it was at the time of the accident, its penetration into the coal bed was about 8 inches. The principal part of the room required 4½-foot props, and these were called for by the plaintiff several days in succession. The plaintiff had in his room 4-foot props and 5-foot props. He was able to use the 4-foot props and did use the same on all that part of the roof lying west of the line of the roll. This line of the roll in the roof was about on the line of the west rail of the track. On the east side of the track, the room was fully propped to within about 35 feet of the north end or face, and partly propped for a further distance, in that a row of props 3½ or 4 feet apart was placed near to and parallel with the east rail of the track. This left an unpropped area of considerable size. At 2:00 o'clock on the day before the accident, the mine foreman was present in the room and promised to send a man down to saw the 5-foot props and render them suitable for use in propping this area. This had not been done at the time of the accident, which occurred the next morning at 7:30. Upon the morning of the accident, the plaintiff entered his room shortly after 7:00 o'clock and made an examination of the roof in the usual way and discovered, as he supposed, that it was solid and, for the time being, safe. He did not, however, proceed with his mining at the face of the room, but he did proceed to load a car with his "stock coal" which he

had accumulated in a pile on the west side of the track. He pushed the car on its track to a point 30 or 35 feet south of the face. At such point he was loading his car, when a fall of slate occurred. This was the result of lack of support to the roof. It came primarily from the unsupported part of the roof, but brought with it a part of the roof which was supported by props. At that moment, the plaintiff was in front of his car adjusting the position of a block of coal. The fall was confined to the east side of the line of the "roll" heretofore referred to. No fall occurred on the west side of the track. The roof over plaintiff's head at the time of the accident was supported by the row of props on the west side of the track already referred to, extending nearly to the face of the room, and by the shorter row of props on the east side of the track, extending to within 17 or 18 feet of the face of the room. This row extended about 7 feet further north than plaintiff's position at the time of the injury. The reason why the room was not propped up to within 6 or 10 feet of the working face was that the plaintiff had been unable to obtain from the defendant the necessary props for that purpose. The foregoing is sufficient statement to enable us to consider the bearing of certain sections of the statute which are of controlling importance. In presenting the foregoing as the "facts," we do so only in the sense that they have support as such in the evidence.

I. At the close of the evidence, the defendant moved for a directed verdict in its favor on the grounds (1) that no actionable negligence on the part of the defendant was shown

1. MASTER AND
SERVANT:
mines: failure
to furnish
props: miner
continuing
work: statu-
torily "safe":
negligence per
se.

in that, if it was negligent at all, such negligence was not the proximate cause of the injury; (2) because the plaintiff had failed to show himself free from contributory negligence and because it appeared conclusively that he was guilty of contributory negligence; and (3) because it appeared conclusively that the plaintiff had assumed the risk of the injury which resulted to him.

This motion was overruled and the case was submitted to the jury. It is now contended for the defendant that such motion ought to have been sustained. This contention is based upon certain recent enactments which have a very important bearing upon the respective rights of the parties herein. The first of these for our consideration is chapter 106 of the Acts of the Thirty-Fourth General Assembly, now incorporated in Sec. 2489 *et seq.* of the Code Supplement of 1913. It is provided therein as follows:

“Sec. 2489-5a. The owner, lessee, operator or person in charge of any mine shall at all times keep a sufficient supply of caps and timbers to be used as props or otherwise, convenient and ready for use and shall send such caps, timbers and props down when requested and deliver them to the places where needed.”

“Sec. 2489-16a. It shall be the duty of each employee to examine his working place upon entering the same and shall not commence to mine or load coal or other mineral until it is made safe. Each miner or other employee employed in a mine shall securely prop and timber the roof of his working place therein. . . . When draw-slate or other like material is over the coal, he shall see to it that proper timbers are placed thereunder for his safety before working under the same.”

From the first section above quoted, it will be observed that it is the duty of the employing corporation to keep a supply of props convenient and ready for use, and that it is its duty to “send such props down when requested and deliver them to the places where needed.” Under the second section, the duty to prop and timber the roof of the miner’s room or working place is upon the miner himself. Manifestly, however, this particular duty cannot rest upon him until his employer has sent the props down. The duty of the employer to send the props down does not arise until the miner has

requested the same. The miner, therefore, is under the antecedent duty to make request for needed props, and we may assume that such request ought to be made at such a time as will give the employer a reasonable time and opportunity to comply therewith before danger be imminent. The further twofold duty is laid upon the miner: (1) To examine his working place upon entry of the same, and (2) he "shall not commence to mine or load coal or other mineral until it is made safe." These duties are continuing duties and rest upon the miner regardless of whether his employer has supplied him with suitable props or not. The affirmative duty here laid upon him is to "examine his working place upon entering the same." He must not permit his attention to be diverted to any other work until he has made such examination. It is a duty of inspection. The second duty trails the first and is prohibitive and negative and forbids him to "commence to mine or load coal" until his working place "is made safe."

The first contention of defendant at this point is that, as the failure of the employer to furnish props when requested becomes negligence as a matter of law because of a violation of the statute, so the failure of the miner, if any, to discover the unsafe condition in his room, and his failure to refrain from mining and loading coal until safety be secured, are also negligence as a *matter of law*, because it is a violation of the express provisions of the statute; and that if it be such negligence, then it becomes the proximate cause of the injury, or at least a contributing cause, either of which will defeat recovery.

For the plaintiff, it is argued that the term "safe" is a relative term and that it necessarily involves different degrees and that its ascertainment in advance must necessarily rest on the judgment of the inspector; and that, therefore, if the plaintiff in this case, in compliance with the statute, did examine the roof of his room with reasonable diligence under all the circumstances, and if, upon such examination,

the conditions discovered indicated a solidity and soundness which satisfied him of its safety; and if, in the manner of making such examination and the extent of it, and in the conclusion which he reached, he acted and judged as a reasonably prudent person of experience would have acted and judged, then he was justified in deeming the place as "safe" and he did not violate the statute by proceeding to load his coal in the manner in which he did.

If we were to adopt the contention of the defendant, it would make the miner an insurer of the safety of the mine, regardless of any breach of duty on the part of the employer. The constructive negligence of the miner thus created would necessarily act as a screen to the employer against the consequences of his default, regardless of the diligence and judgment which the miner might exercise in a given case. We think that the term "safe" is necessarily a relative one. By its very meaning it involves degrees. There can be no such thing as absolute safety,—certainly not in a coal mine. There may be comparative safety or a high degree of safety. Even then the accident may happen. *After* the accident, and in the light thereof, it was disclosed that the place was not previously safe and the danger was in fact imminent. *Before* the accident, it may have been beyond the range of ordinary diligence, skill, and experience to have discovered the danger. If this had been a case of failure to prop when props were furnished, or a failure to request props when they ought to have been requested, quite a different question would be presented. The miner is not required to keep out of his room because it is not propped. He is required to inspect it promptly and diligently and to discover its dangers to the extent that diligence will discover the same. He is necessarily exposed to possible danger in the performance of this duty. If in the inspection he discovers indications of a condition which a reasonably prudent man would not regard as safe, then the place is not safe within the meaning of the statute. And the converse of this proposition must likewise

be true, assuming that there has been no want of reasonable diligence in the inspection. In other words, the criterion of *safety*, within the meaning of the statute, must be the facts or conditions which were ascertainable by reasonable diligence *before* the accident, and not merely the later developments of the accident itself.

II. It is contended for the defendant that, even under the criterion here declared, the contributory negligence of the plaintiff was conclusively made to appear. The "roll"

2. MASTER AND
SERVANT:
mines: un-
propped roof:
miner continu-
ing work: con-
tributory neg-
ligence per se.

which has been referred to was in the nature of a defect in the roof in that such a formation often, if not usually, is attended with a "slip." By a "slip" is meant a break or cleavage in the continuity of the slate structure of the roof. When the fall of slate occurred, the line of the roll represented the break or west line of the falling roof. The plaintiff had, some days before, requested the foreman to timber over his track because of such roll. It is argued that the plaintiff, as an experienced miner, must have known that the unpropped area was large and that the roll was liable to contain a "slip." It is argued further that the very fact that he had repeatedly requested the props was conclusive evidence of his knowledge of their need and the impending danger to be avoided by their use, and that he therefore necessarily knew that the place was not safe, and he was not justified in putting himself under such roof for the purpose of loading coal. The evidence is by no means conclusive that a "roll" is always attended with a "slip." Nor is it conclusive that there was a "slip" in this case. The evidence does show that the slate broke at or near that line, but this fact can be accounted for plausibly by the fact that the roof to the west of such line was supported by the row of props. It also appears in evidence for the plaintiff that there was no slip in this roll. The fact that plaintiff ordered the props should by no means be considered as evidence of knowledge of imminent or impending danger. If this contention were sustained, a miner could not work after

ordering props until the props were actually received. This would result in very intermittent work, because some reasonable time must elapse before the request for props can be complied with. The general practice which seems to obtain is that the miner must foresee his needs to some extent and make his request so that the employer shall have reasonable time to comply. The statute impliedly recognizes the fact that the roof of the mine presents latent and potential danger at all times, even though such danger be not imminent or impending. The potential danger may become imminent at any time "in the hour that ye think not." This potential danger is not eliminated by the mere fact that the place is found safe for the time being. The imminent danger may be guarded against temporarily by frequent inspection and permanently by propping and timbering. It should be conceded that the unpropped area in this room was large and that the call for props had been insistent and repeated and that its potential danger was naturally becoming imminent by reason of the area and elapsing time. If this were all, these circumstances would be very significant and persuasive. As against these, however, is the fact that the plaintiff was not working under the unpropped area. That part of the roof under which he was working was propped. The short row of props on the east side extended north of where he was standing, a distance of 7 feet. We think, therefore, that the evidence of contributory negligence was not of such a conclusive character as to require a directed verdict for the defendant.

III. It is urged for the defendant that its negligence, if any, in failing to furnish the props was not actionable in that it was not and could not be the proximate cause. Particular reliance is placed upon the case of

3. MASTER AND
SERVANT:
mines: falling
roof: failure
to furnish
props: prox-
imate cause.

Lammey v. Coal Company, 144 Iowa 640, and
Williams v. Coal Company, 146 Iowa 489.

In the first cited case, the injured party had discovered the loosened condition of the roof in advance of the accident and had feared it, but reck-

lessly continued to work under it, nevertheless. Contributory negligence was found. In the *Williams Case*, the room was propped as close to the working face as the convenience of the miner would permit. In the unpropped space was a loosened stone, which would have been discovered by the customary inspection. The injured miner neglected to inspect. It was held there that the absence of props had no causal relation to the accident. Though in that case the miner had put in an order for props, it was in anticipation of later needs and delivery was not expected except in the ordinary course, which would require two or three days. And if the props had been present in the mine, they could not and would not have been used prior to the time of the accident. These cases do not furnish support for defendant's contention at this point. If the *plaintiff* was guilty of negligence, then such negligence either contributed to the injury or was the independent cause of it. In either case, the question of defendant's negligence would become quite immaterial. If the plaintiff was not guilty of contributory negligence, was the accident without fault of anyone? The evidence was ample to justify a finding that the defendant's failure to furnish the props was the sole reason for the failure of the plaintiff to prop and that the plaintiff would have propped the entire area up to a short distance from the working face if the props had been furnished. It is to be conceded that there is some apparent remoteness between the defendant's negligence and the accident. This apparent remoteness arises out of the statutory recital of the respective duties of employer and miner. Their respective duties under the statute are intervening and alternating. The duty of each is split, so to speak. The initial duty of the employer is to "keep props ready for use." He is not required at this point to send them down to the miner. Before this duty arises, the duty of request must be performed by the miner. Thereupon, the duty to send the props down to the miner is imposed upon the employer. The duty of the miner to prop does not arise until the antecedent duties have been performed. He is, how-

ever, at all times under the duty of inspection and discovery of those ascertainable indications of either progressing or imminent danger. The duty of the employer is predicated primarily upon the potential danger of the unpropped roof—a danger not necessarily imminent. The duty of inspection imposed upon the miner deals with the more imminent. In that sense, the miner stands between the employer and the consequences of his negligence or delay, if any. But the employer is charged also with the knowledge that the potential danger of the unpropped roof may become the imminent danger at any moment, and that this may occur in a way against which the reasonable diligence of the miner cannot provide without props, and in a way to prevent discovery even by the reasonable diligence of the miner. If we were to hold, therefore, that the failure of the employer to comply with the provisions of this statute was too remote to be the proximate cause of the ultimate injury, we would quite destroy the manifest purpose of the statute. We think, therefore, that the violation of the statute at this point by the employer should be deemed as an obstacle in the way of propping the mine and that the failure of the miner to prop in such a case should be deemed the failure of the employer. If it can be said, therefore, that the failure to prop the mine was the proximate cause of the accident, then the alleged negligence of the defendant could be such proximate cause. Under the evidence in this case, the question was properly for the jury.

IV. Considerable argument is devoted to the question of assumption of risk. The argument for the defendant is that, though it be true that the defendant failed to furnish the props, such fact was known to the plaintiff, and that the danger arising therefrom was as well known and appreciated by him, as an experienced miner, as it could have been to his employer. The trial court submitted the question of assumption of risk to the jury. But the defendant

4. MASTER AND
SERVANT:
mines: failure
to furnish
props: miner
continuing
work: assump-
tion of risk.

complains of the form of the instructions whereby it was submitted. Because of the conclusion we reach, we will not deal with the specific errors presented at this point. The question of assumption of risk would be clearly involved in the case, were it not for chapter 219, Acts of the Thirty-third General Assembly, which now appears as Sec. 4999-a3, Code Supplement of 1913, which is as follows:

“That in all cases where the property, works, machinery or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery or appliances to furnish reasonably safe machinery, appliances or place to work, the employee shall not be deemed to have assumed the risk, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employee may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of the employee to make the repairs, or remedy the defects. Nor shall the employee under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to the employment; and no contract which restricts liability hereunder shall be legal or binding.”

If we are correct in our views already expressed as to the causal relation between the negligence of the defendant and the accident in question, then it must be said that the defect of failure to prop was a defect of appliances which it was the duty of the defendant to furnish. Knowledge of such failure was known equally to the employer and the employee. The purpose of this statute is to forbid the employer to lay upon his employee the consequences of his own failure simply because such failure was known to the employee. There is

a certain stress or momentum in the industries that keeps them moving for a time though supports be broken and defects be apparent and though the risk of accident be thereby greatly increased. This stress has heretofore been borne by the employee. The manifest purpose of this statute is to lay it upon the employer. It is argued for the defendant that this case is governed by the exception stated in the statute above quoted, viz., that it was the duty of the plaintiff in the ordinary course of his employment "to make the repairs or remedy the defects." That is to say, ordinarily it would be the duty of the plaintiff to put up the props. As we have already seen, such duty would not arise until the props had been furnished, and it never did arise in the case before us.

We are clear, therefore, that this feature of the case is controlled by the quoted statute. The question of assumption of risk, therefore, is not in the case. The case must turn upon the question of the negligence of the defendant and that of the contributory negligence of the plaintiff; and these questions must be governed by the terms of the statute which we have already quoted.

The conclusions announced above have support in the following cases: *Low v. Clear Creek Coal Company*, (Ky.) 131 S. W. 1007, and *Johnson v. Mammoth Vein Coal Company*, (Ark.) 114 S. W. 722; although the statutes construed in the cited cases differ somewhat in material respects from those herein construed.

V. Complaint is urged against many of the instructions. We shall not deal with these *seriatim*. It is enough to say that the case was not submitted to the jury upon the theory that

5. MASTER AND
SERVANT:
mines: failure
to prop roof:
injury: facts
essential to
recovery.

the respective rights and duties of the parties were controlled by the statutes which we have above quoted. The question of the liability of the defendant was submitted as the common-law liability for negligence and without regard to the particular statutory provisions. The burden was upon the plaintiff to show (1) that he had re-

quested the props; (2) that they had not been furnished within a reasonable time; (3) that this was the reason for his failure to prop the roof; (4) that upon entering the mine upon the morning of the accident he made a diligent examination of the roof; (5) that with reasonable diligence in his examination he could not discover indications of a loosening roof, and that as a reasonably prudent man he believed the same to be safe at that time. All of the foregoing propositions are based upon the express provisions of the statute. None of these questions were submitted to the consideration of the jury.

Complaint is directed against Instruction VII, which was as follows:

“One who is injured by the negligence of another cannot recover compensation for his injury if he by his own ordinary or wilful wrong contributed to produce the injuries of which he complains, so that but for his concurring and co-operating fault, the injury would not have happened to him.”

6. MASTER AND
SERVANT:
Instructions:
contributory
negligence: in-
advertent
omission.

It is quite evident that the word “negligence” was omitted by inadvertence after the word “ordinary.” This was the only instruction given on the subject of contributory negligence. From what we have already said, it is manifest that it was not sufficient.

Complaint is directed against instruction VI, which purports to be an abstract definition of negligence. We need not set it out. It is sufficient to say that it is a departure from the usual definition and is of doubtful accuracy, to say the least. An appropriate definition is set forth in instruction VIII. We think it preferable to the other.

Complaint is urged against several instructions which deal with the question of assumption of risk. In view of what we have said in division IV hereof, we need not deal with these.

VI. The trial court withdrew from the consideration of the jury certain allegations of negligence made in the petition and withdrew the evidence offered by the plaintiff in support

7. APPEAL AND
ERROR: rulings adverse
to winning
party: review.

thereof. From such order, the plaintiff has appealed and has argued the questions thus presented. The plaintiff won his verdict. The petition of plaintiff was in one count and for general damages. The trial court withdrew no cause of action, nor did it withdraw any item of damages; nor did the order affect the measure of damages. The plaintiff having finally won the verdict, such rulings of the court, even if erroneous, were necessarily nonprejudicial. *Herman & Marks v. Hass*, 166 Iowa 340.

The only relief which the plaintiff could obtain would be a new trial. He obtains that upon the appeal of the defendant. Our appellate practice does not contemplate that we shall give abstract consideration to the grievances of the winning party unless they operated to the reduction of the recovery. The effect of the reversal on the appeal of the defendant is to set aside the adjudication and to re-open the case for trial.

For the reasons indicated, a new trial must be awarded and the judgment below is accordingly—*Reversed*.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

THE FIRST NATIONAL BANK OF WEBSTER CITY, IOWA, Appellant, v. ACME CO-OPERATIVE BRICK & TILE COMPANY et al., Appellees.

ATTACHMENT: Discharge—Saving Lien by Appeal—Failure to Perfect within Two Days. An attachment lien lives two days after an order of discharge, provided plaintiff, at the time of the order, announces his intention to appeal therefrom. All portions of the lien not preserved by perfected appeal within said two days are wholly lost. (Secs. 3931, 3932, Code.)

PRINCIPLE APPLIED: An attachment was levied on a brick plant. Neither the sheriff's return, the pleadings, nor the evidence

even approximated the kind, quantity, or value of the attached personal property. The cause was transferred to the equity calendar and there tried. Within two days after the discharge of the attachment, an appeal was perfected, specially stating that no appeal was taken from the discharge of the "real estate, buildings, machinery, tools and appurtenances." Six months later, a supplemental appeal was perfected, attempting to largely broaden the first appeal. *Held*, the first appeal left no question for the consideration of the appellate court on the attachment branch of the case.

ATTACHMENT: Discharge—Receivership—Effect on Attachment

2 **Lien.** The necessity to perfect within two days an appeal from an order discharging an attachment, in order to preserve the lien, is not affected by the fact that pending the litigation, a receiver for the property was appointed, "subject to the attachment lien." In such case, the receivership does not supplant the attachment.

APPEAL AND ERROR: Matter Not in Issue—Relief. The court

3 cannot assume to accord relief on matters not in issue—for instance, an attaching plaintiff, pleading at all times in defense of his right to hold certain property under an attachment, cannot be awarded the proceeds of collateral securities, not covered by the levy, but turned over to him after the attachment, and later delivered by him, on demand, to a receiver of the property, no issue as to this collateral being made in the pleading.

BILLS AND NOTES: Signature—Genuineness—When in Issue—Un-

4 **verified Answer.** An unverified answer, denying authority to execute notes, does not put the genuineness of the signature thereof in issue. (Sec. 3640, Code.)

APPEAL AND ERROR: Equitable Relief beyond Pleading—No

5 **Ground for Complaint.** The decreeing of insufficient equitable relief, *entirely beyond the pleading*, furnishes no ground for complaint by the party to whom decreed. The party, not having asked *any* relief, cannot complain because the court did not grant greater relief than it did.

PRINCIPLE APPLIED: Plaintiff brought an action in attachment on certain notes and at all periods of the proceeding stood strictly on that right. The defense, by interveners, was that the defendant in attachment had no interest in the property. The cause was tried in equity. The court held with interveners, but also found that a portion of the money for which plaintiff's

notes were given was used in discharging liabilities against the attached property and made plaintiff a creditor of the owner of the property to such estimated extent. Plaintiff had prayed for no such relief. *Held*, plaintiff could not complain.

VENDOR AND PURCHASER: Sales—Transfers on Condition—Conditions Unfulfilled—No Attachable Interest Conveyed. The formal conveyance of property by the owner, when no credit is intended, and on condition that the owner be at once paid therefor, which condition is not fulfilled, creates no such right of property in the transferee as can be levied on by his attaching creditors.

Appeal from Hamilton District Court.—HON. R. M. WRIGHT, Judge.

SATURDAY, NOVEMBER 28, 1914.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION at law upon promissory notes aided by attachment. Interveners appeared, claiming the attached property. Upon trial had, there was a decree discharging the property. The plaintiff appeals.—*Modified and Affirmed.*

Wesley Martin and W. J. Covil, for appellants.

D. C. Chase, for defendant, Acme Co-operative Brick & Tile Company, and interveners, Webster City Brick & Tile Company, Alice H. Soule.

A. N. Boeye and J. L. Kamrar, for interveners, Hamilton County State Bank, Ethel C. Hathway, G. P. Christianson, B. F. Keltz, John Whaley, appellees.

EVANS, J.—The plaintiff brought its action at law upon two promissory notes. It sued out a writ of attachment which was levied upon certain property as the property of the principal defendant, Acme Co-operative Brick & Tile Company.

The Webster City Brick & Tile Company and certain of its stockholders and creditors appeared in the action as

interveners. They pleaded that the attached property was not the property of the attachment defendant, and that it had no attachable interest therein, but that the same was the property of the Webster City Brick & Tile Company.

The petitions of intervention were all denied by the plaintiff. The attached property was a certain brick and tile plant located at Webster City, together with all its appurtenances and stock on hand. This property comprised at one time all the assets of the Webster City Brick & Tile Company. The story preceding the attachment is involved in considerable dispute, and in a maze of attempted proceedings. The net result, however, is quite simple.

Prior to the fall of 1911, the Webster City Brick & Tile Company was an operating corporation engaged in the business indicated by its name. It was capitalized for \$90,000, and was supposed to have property of equal or greater value. Its indebtedness, however, was about \$50,000. The stock was all owned in one family, spoken of in the record as the "Soule family." This included Mrs. Carey, a daughter of the family, and her husband. The Soules desired to sell the property and to liquidate the affairs of the corporation and to retire from business.

Defendant Ward was a promoter residing in Minnesota. He came upon the ground and proposed to carry out a scheme that would result in the sale of the plant and the retirement of the corporation. This scheme involved the organization of a new corporation, which should become the purchasing corporation. Ward proposed to find purchasers of the stock of the new corporation, and in that way to finance the purchase of the plant.

According to the contention of interveners, which was sustained by the decree of court, the purchasing company was to pay the specified debts of the selling company and was to pay to the Soule family the further sum of \$100,000, or a total of \$155,000.

The new company was organized under the laws of West

Virginia, upon an authorized capital of \$250,000 preferred stock, and \$250,000 common stock. The plan was to sell the preferred stock at par and to donate one share of common stock with each share of preferred stock. Ward employed a number of men who were to engage in the business of selling the stock. They came upon the ground and did so engage in attempted sales for a considerable period.

In pursuance of the plan, the selling company executed a formal deed of its plant and appurtenances to the new company, and the same was put of record. To protect the selling company in the interim, \$155,000 of stock was issued in the new company and delivered in trust to the secretary of the selling company, the intention being that this should be released to purchasers as fast as the same should be sold. It was in this manner that the purchase money for the selling company was proposed to be procured.

The attempted enterprise never progressed any further. Not a dollar's worth of stock in the new company was ever sold, although a large expense was incurred in paying salaries of salesmen, which was paid out of the assets of the selling company.

Ward was the president of the new company. He was active in its purported management. He had been active in the management of the plant before its actual transfer. Within a few weeks after the transfer of property was made to the new company, Ward procured loans from the plaintiff for the new company to the amount of \$4,500, and gave the notes of the new company therefor, and endorsed the same himself. It is upon these notes that this suit was brought. As already indicated, the Webster City Brick & Tile Company and its creditors appeared as interveners. The substance of the pleading of the old corporation was that the deed of its property was delivered conditionally, and as a part of the transaction which was never completed. The substance of the condition was that the debts of the old corporation were to be paid, and the purchase price. Because of the failure of the

conditions and the failure of the contemplated scheme, it was pleaded, in effect, that no property ever passed to the new company, and that it had no attachable interest therein. Issue was taken by reply upon these allegations.

On behalf of plaintiff, it was contended that the agreement between the old company and the new was that the stockholders of the old should receive 155,000 shares of the stock of the new, and that they did receive the same, and evidence was introduced in support of this contention.

Because of the petitions of intervention, the trial court transferred the case to the equity side, and it was so tried. The decree was that the new company had no attachable interest in the attached property, and the same was released from the attachment and in effect was awarded to the old company. A receiver, however, had been appointed pending the litigation, and the decree awarded the property to such receiver, free from the attachment lien.

1. The plaintiff perfected an appeal within two days. The appeal, however, purported to be from a part of the decree only, and especially excepted other portions thereof.

1. ATTACHMENT: The notice of appeal specified the exceptions
discharge: as follows:
saving lien by
appeal: fail-
ing to perfect
within two
days.

“Excepting that no appeal has been taken from that part of said decree discharging the real estate, buildings, machinery, tools and appurtenances attached from the lien of the attachment in said cause, and that said property be restored to H. M. Sparboe, Receiver, and that part of the decree directing the receiver to sell property, and no appeal is taken from the judgment against B. H. Ward. As to all other parts of the said findings, orders, judgment and decree, plaintiff has appealed to the Supreme Court of Iowa.”

This notice of appeal was served on June 28, 1913. Subsequently, on November 28, 1913, a supplemental appeal was taken by the service of an additional notice. This pur-

ported to be an appeal from the decree with the following exception only :

“ Excepting that no appeal is taken from that part thereof ordering the receiver to sell said property, and no appeal is taken from the judgment against B. H. Ward, and the rights of previous appeal reserved.”

The attachment having been discharged by decree of the court, such discharge became absolute and conclusive, unless appealed from within two days, as provided by sections 3931 and 3932 of the Code. We cannot, therefore, review the order of discharge of the attachment, so far at least as it relates to the property excepted in the first notice of appeal.

It is contended for appellant, however, that there was personal property attached, being in the form of stocks on hand, and that this property was not included in the exception. This may be theoretically correct. But a further difficulty confronts us here.

The case is triable *de novo* here. We must try it upon the evidence in the record. It appears inferentially from some portions of the record that there was some personal property on hand; but we are unable to find definite evidence on the subject.

The sheriff's return on the writ of attachment contains the following reference thereto and no more: “ And this levy also includes all of the clay products, brick and tile situated or being upon the said described land levied upon, both in the yards for the storage of brick and tile, and also in the kilns in which said brick and tile are burned.”

We find nothing more definite than this either in the pleadings or in the evidence. There is nothing from which we could approximate the kind, quantity or value. No witness testified on the subject. Indeed, from the very nature of the issue made by the pleadings, there appeared to be no occasion for differentiating the property.

Under the issues as made, if the new company had an attachable interest in any of the property, it had such in all, and *vice versa*. We think, therefore, that when the appellant excepted from its first notice of appeal "that part of said decree discharging the real estate, buildings, machinery, tools and appurtenances attached," it left nothing to be reviewed on this branch of the case. The part of the decree thus referred to in the notice of appeal was as follows:

2. ATTACHMENT:
discharge: re-
ceivership: ef-
fect on attach-
ment lien.

"It is therefore, on this 28th day of May, 1913, ordered, adjudged and decreed that the attached property be discharged and fully released from any alleged lien by virtue of the writ of attachment herein; that said property be restored to H. M. Sparboe, who is acting as receiver, to be held as the property of the Webster City Brick & Tile Company; that said property and the proceeds thereof be held for the benefit of the creditors of the Webster City Brick & Tile Company, and for the benefit of the plaintiff to the extent hereinbefore stated, subject to further orders of this court."

There was no attempt at differentiation in the decree.

It is urged by the appellant that the sections of the statute above referred to have no application to the case because its attachment was supplanted by receivership, and that it now takes its rights through and under the receiver. Granting, without deciding, that the procedure could have taken that course, this was not done. The order appointing the receiver specially provided that the receiver took the property subject to the plaintiff's attachment lien and subject to his right of special execution, in case it should be found upon trial that the plaintiff had acquired an attachment lien. And this was made to apply specifically to the changing form of products in the course of operation of the plant. Plaintiff's attachment lien, therefore, continued in force until the final hearing and until the final decree. The final decree discharged it, and we see no escape from the sections of the statute above cited.

The order of sale issued to the receiver was issued in connection with the order of discharge of the attachment, and was hostile to the attachment. Such order of sale was excepted from the notice of appeal in express terms. This only emphasizes the difficulty of attempting to differentiate between the personal property and the realty on this appeal.

2. It is urged by appellant that it was entitled to recover the proceeds of certain accounts which had been assigned to it by Ward as president of the new company. It appeared in

3. **APPEAL AND ERROR: matter not in issue: relief.** evidence that after the attachment suit was begun, Ward assigned to the plaintiff a considerable number of accounts as collateral security to the debt, and that thereafter, the plaintiff turned them over to the receiver upon his demand. As to this matter, the pleadings presented no issue. In two of the petitions of intervention, it was alleged that such assignment had been made without authority. In answer to one of such petitions, the plaintiff pleaded that it had turned the same over to the receiver. No further reference was made to the subject by any pleader.

The plaintiff stood at all times upon its petition as an attaching plaintiff. All its answers to petitions of intervention were defensive of its right to hold the attached property under its attachment. The question, therefore, whether it was entitled to hold its collateral security was not within the issues made. The decree did not purport to pass upon the same. The question, therefore, cannot arise upon this appeal.

3. Appellant complains because the court failed to enter judgment upon the note against the principal defendant, the Acme Company. The decree did not in terms discharge such

4. **BILLS AND NOTES: signature: genuineness: when in issue: unverified answer.** defendant, neither did it award plaintiff any judgment against it. There was an evident oversight one way or the other. We are in some doubt as to whether the plaintiff ought not to have brought the omission to the attention of the

trial court and obtained there a correction of the decree before presenting his appeal here.

There was evidence impeaching the authority of Ward to execute the notes in suit to the plaintiff on behalf of the company. This evidence tended to show that it was done without authority from the board of directors, and therefore in violation of the by-laws of the company. The difficulty, however, with the consideration of this evidence is that no issue was properly made by the defendant's answer on that question.

The principal defendant did file an answer denying the authority, but it was an unverified answer. The notes were set forth by copy in the petition. Under section 3640 of the Code, the signatures thereto were to be deemed genuine, unless denied "under oath". Under this section, therefore, there was no issue made as to the genuineness of the signatures. Presumptively, therefore, the plaintiff was entitled to a personal judgment against the makers of the notes.

On the other hand, under the finding of the decree, the Acme Company had no property. It was a mere name, a purported corporation without a stockholder and without a dollar of assets. The failure of the court to render judgment against it could not ordinarily have been prejudicial. It is conceivable that the adjudication itself might be important to the plaintiff in some contingencies. It is conceivable, also, that the money borrowed from the plaintiff by the corporation might have been invested in property which would constitute assets, and be subject to execution. But the testimony is undisputed that the money was not thus used, but that it was expended in the payment of liabilities of some kind already incurred. Inasmuch, however, as plaintiff was, upon the record, legally entitled to a judgment against the Acme Company, the decree will be modified in that respect.

4. There was evidence tending to show that a considerable portion of the funds borrowed from the plaintiff by the

new company was expended in discharging the liabilities of the old. The trial court estimated the amount so expended at one third thereof, and ordered that to that extent, the plaintiff should be deemed as a creditor of the old company, and should share in the distribution of its assets at the hands of the receiver. The appellant now complains that the amount thus allowed by the trial court was materially less than the amount shown by the evidence, and that the appellant ought to have been permitted to share to greater extent in the distribution of the assets of the old company.

5. APPEAL AND
ERROR: equitable relief
beyond pleading:
no ground for complaint.

We are confronted at this point also with the difficulty that no such issue was made by the pleadings, and no such relief was asked by the plaintiff. The order of the trial court was equitable as far as it went, but it was beyond the pleadings. The plaintiff stood in court strictly as an attaching plaintiff. No other relief was asked for in its petition. In its answers to the petitions of intervention, it pleaded only in defense of its right as an attaching plaintiff.

The question presented was primarily one of right of property as between the two companies. If, as between them, the purchasing company acquired no right of property, then the right of a mere attaching plaintiff rose no higher than the right of its debtor. And this was the only question made by the pleadings. This is not saying that the plaintiff might not have been entitled to some equitable relief as against the selling company, and that it might not have been entitled to make itself a creditor of such selling company to the extent of the benefits conferred upon it. But this could only be done by appropriate pleadings and procedure to that end. The equities, therefore, extended to the plaintiff in the decree went beyond the pleadings, and the appellant is in no position to complain of its insufficiency.

In only one respect can we conceive of a possible prejudice to the appellant, and that is that it may be precluded by the adjudication from attempting to obtain further equitable

relief in the future. If it deems itself prejudiced in this respect, the decree will be modified at its election so as to eliminate this relief from the decree. Otherwise, the order in this respect will stand as made. Upon this record, we cannot review its correctness. Whether the suggested elimination would be legally effective to save to plaintiff any right to seek equitable relief hereafter is a question upon which we are neither called upon nor prepared to express opinion.

5. The foregoing disposes of the particular questions presented for our consideration. Because the appeal is from a part of the decree only, we cannot review the merits of the

6. **VENDOR AND
PURCHASER:**
sales: trans-
fers on condi-
tion: condi-
tions unful-
filled: no at-
tachable in-
terest conveyed.

case as a whole. We may properly say, however, that upon consideration of the entire evidence, we are impressed that the contemplated transaction between the two companies was incomplete; that there was no intent on the part of the Soule family to extend credit to the new company or to purchase its stock; that the passing of the property of the old company to the new was done in the expectation of immediate payment therefor, through the promised sale of stock. As between the two parties, no right of property passed, the transaction contemplated being still incomplete.

Ordinarily, the rights of purchaser and seller, when no credit is extended, attach simultaneously, even though one deliver before the other. Of course, delay in the period of transition may give rise to equities in favor of innocent third parties. But a mere attaching plaintiff is not deemed such. It may give rise, also, to equities as between the parties themselves, but no such question is presented here.

The decree entered below will be modified as herein indicated, and in all other respects—*Affirmed*.

LADD, C. J., WEAVER and PRESTON, JJ., concur.

P. C. FISHER, Appellee, v. MAPLE BLOCK COAL COMPANY et al.,
Appellants.

EMINENT DOMAIN: Statutory Right to Condemn—Strict Construction—Mining Lands. A coal mining company having access to its mining lands, in part by a public way and in part by private way, cannot condemn a right of way for a railway to its said lands, under Secs. 2028, Sup. Code, 1913, and 2031, Code, said sections clearly limiting such right to him who has no "public or private way" thereto. Especially is this true in view of the rule that statutes conferring the power of eminent domain are to be strictly construed in favor of the private owner.

PRINCIPLE APPLIED: In instant case, the court says: "The proposed mutilation of the Fisher farm and the fact that the benefits to accrue therefrom were only nominally public are suggestive of the reason why the power to condemn should be doled with a sparing hand."

Appeal from Polk District Court.—HON. CHARLES A. DUDLEY and HON. HUGH BRENNAN, Judges.

WEDNESDAY, MARCH 10, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

SUIT in equity to enjoin the contemplated condemnation of land for the purpose of egress and ingress to a coal mine. Temporary injunction was issued and served. Defendants moved to dissolve the temporary writ. A hearing was had upon such motion and evidence was introduced. Thereupon the motion was denied. The defendants appeal.—*Affirmed.*






JOHN L. GILLESPIE, for appellants.

STIPP, PERRY & STARZINGER, for appellees.

EVANS, J.—Three cases are presented upon the same submission. They are all related and present the same question.

P. C. Fisher and E. P. Fisher are husband and wife and owners respectively of adjoining farms, the first of 200 acres and the second of 240 acres. The defendant Maple Block Coal Company is a corporation engaged in the business indicated by its name and the defendant Griffin is the sheriff of Polk county. The coal company proposes to extend a spur track of railroad over the lands of the Fishers for the purpose of reaching proposed shafts in certain coal fields which it holds. The following map will aid an understanding of the controversy:

EMINENT DOMAIN: statutory right to condemn: strict construction: mining lands.

-  Land owned by defendant.
-  Mining Rights owned by defendant.
-  Land owned by E.P. Fisher.
-  Land owned by P. C. Fisher.
-  Public Highway.

At a point within the square abutting on the north line of the SE $\frac{1}{4}$ of Sec. 28, the coal company has maintained a

shaft for several years, and has had a spur of railroad track extending from such shaft south to the main line of the Rock Island Railroad. It now proposes to sink a shaft in the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 29 and one in the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 22 and to extend its spur in each direction to such new shafts, forming a Y, as indicated on the map. For that purpose, it proposes to condemn a right of way across the necessary lands of the Fishers. Its right to condemn is challenged by the Fishers. The first action was brought by the coal company against the Fishers to enjoin interference with the survey of the ground by the coal company and its engineers. The other two suits were brought by the Fishers, respectively, each asking to enjoin the coal company from a purported condemnation, on the ground that there is no statutory authority for the same. The one question in the case involves the construction of Secs. 2028 of the Code Supplement, and 2031 of the Code, which are as follows:

“Sec. 2028. Any person, corporation, or co-partnership owning or leasing any land not having a public or private way thereto, may have a public way to any railway station, street or highway, established over the land of another, not exceeding forty feet in width, to be located on a division, subdivision or “forty” line or immediately adjacent thereto; but if a railway is to be constructed thereon, as provided in section two thousand and thirty-one (2031) the same may be located wherever necessary and practicable, but not exceeding one hundred feet in width, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through enclosed land, be fenced on both sides by the person or corporation causing it to be established.”

“Sec. 2031. Any owner, lessee or possessor of lands having coal, stone, lead or other mineral thereon, who has paid the damages assessed for roads established as above provided, may construct, use and maintain a railway thereon, for the

purpose of reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In giving the notices required in such cases, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established, and, if it be so stated, the jury shall consider that fact in the assessment of damages."

All of the lands owned or leased by the coal company abut upon the public highway, except the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 22, known in the record as the "Kirk forty." This tract does not abut upon the public highway, but it is connected therewith by a strip of ground 33 feet in width, which is owned and used by the coal company as a private way from the highway to such tract.

The coal company bases its alleged right to condemn upon the sections of the statute above quoted. The Fishers contend that by the terms of these sections they are applicable only to owners or lessees of "land not having a public or private way thereto." It is contended for the coal company that such a construction would be narrow and technical and that it would leave the statute wholly inadequate to meet the exigencies of the mining of coal. It is shown that over 90 per cent. of the coal mined by this company is shipped to distant points on the railway. It is probably true that practical coal mining, as carried on today, requires a rail haul for the product. It is probably true, also, that a connection with a mere public highway is not of great practical value to a coal mine. The fact remains that we must read the statute as it is. It presents no special difficulty of construction. Its real meaning stands out quite plainly. If it has become inadequate, since its enactment, to the later development of mining enterprise, that is a question for legislative consideration and not for ours.

The sections above quoted had their origin in Secs. 1

and 4 of chapter 34 of the Fifteenth General Assembly, which were as follows:

“Sec. 1. That any person, co-partnership, joint-stock association, or corporation, owning, leasing, or possessing any lands having thereon or thereunder any coal, stone, lead, or other mineral, may have established over the land of another a public way from any stone-quarry, coal, lead, or other mine, to any railway or highway, not exceeding (except by the consent of the owner of the land to be taken) fifty feet in width. When said road shall be constructed, it shall, when passing through enclosed lands, be fenced on both sides by the person or corporations causing said road to be established.”

“Sec. 4. Any owner, lessee, or possessor of lands having coal, stone, lead, or other mineral thereon, who has paid the damages assessed for highways established under this act, may construct, use, and maintain a railway on such way, for the purpose of reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In the giving of the notices required by this act, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established; and if it be so stated the jury shall consider that fact in the assessment of damages.”

If these sections had not been amended, they would furnish ground for the coal company's contention. But Sec. 1 was subsequently amended and it now appears as Sec. 2028, which we have above set forth. The amendment thus indicated could have no function unless it were to restrict the power of condemnation to the class or circumstances therein described, viz., owners and lessees of “lands not having a public or private way thereto.” This is the construction which we have previously put upon the statute in its present form. *Morrison v. Thistle Coal Co.*, 119 Iowa 705; *Perry v. Supervisors*, 133 Iowa 281; *Carter v. Barkley*, 137 Iowa 510; *Miller v. Kramer*, 148 Iowa 460.

It is true that when the condemnor comes within the statutory conditions, he may take his choice as between a highway and a railway connection. But he can have only the one "way." No limitation is put upon his use of such way as he acquires. He may use it as a wagonway or railway, and probably both. But having acquired the one or the other, he may not again condemn for outlet purposes; and it matters not, under the statute, whether he has acquired his previous outlet by condemnation or by private contract. It may be true, as claimed by the coal company in this case, that the owner without means of egress is in a more advantageous situation than is he who has one. That depends entirely upon the plans of such owner. These are his own and known to him alone. The statute has been proclaimed in advance and the plans of the owner are made in its knowledge.

We think the statute is not fairly capable of the construction contended for by appellant. If it were, we would still be confronted by the rule that statutes conferring the power of eminent domain are to be strictly construed in favor of the private owner. *McElroy v. Kansas City*, 21 Fed. 257, 260; *Wise v. Yazoo City*, 96 Miss. 507 (26 L. R. A. (N. S.) 1130, 1132); *Ligare v. Chicago*, 139 Ill. 46 (28 N. E. 934, 936); *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449, 456; *City of East St. Louis v. St. John*, 47 Ill. 463, 467; *Bishop v. North Adams Fire Dist.*, 167 Mass. 364, 369 (45 N. E. 925); *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137, 146.

The proposed mutilation of the Fisher farm, as indicated by the map and the legs of the Y, and the fact that the benefits to accrue therefrom were only nominally public, are suggestive of the reason why the power to condemn should be doled with a sparing hand. This doubtless explains the amendment by the Twenty-fifth General Assembly of the enactment of the Fifteenth General Assembly.

We are clear that the statute as it is was correctly construed by the trial court. Its order is therefore—*Affirmed*.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

EUGENE HAHNEL, Appellant, v. HIGHLAND PARK COLLEGE,
Appellee.

APPEAL AND ERROR: Directed Verdict—Evidence Considered—

- 1 **Presumption.** The presumption exists that the court, in ruling on a motion for a directed verdict, considered all evidence introduced up to that stage of the trial.

APPEAL AND ERROR: Contract of Employment—Master and Serv-

- 2 **ant—Directed Verdict.** Evidence reviewed and held to present a jury question on a contract of employment, and whether the same was or was not divisible.

FRAUDS, STATUTE OF: Parol Contract of Employment—Taking

- 3 **Contract Out of Statute—Part Performance.** A parol contract of employment, within the statute of frauds, is not a void contract but is unprovable. In so far as it has been performed, it has been taken out of the statute.

Appeal from Polk District Court.—HON. C. A. DUDLEY,
Judge.

MONDAY, MAY 10, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION at law to recover a balance alleged to be due for services rendered by plaintiff to the defendant as a teacher of music from September 1, 1912, to September 1, 1913. The petition was in two counts. In the first, the plaintiff alleged a parol contract of employment at the rate of \$1,800 per year, and the payment of \$1,650. In the second count, plaintiff sought to recover the same amount, \$150, upon a *quantum meruit*. At the close of the plaintiff's evidence, the defendant moved for a directed verdict, because, as to the first ground, no evidence was introduced showing a verbal contract for one year,—that the evidence, if it proves anything, proves a ver-

bal contract for three years,—and because the evidence so far shows that there had been a written contract for five years, which had expired, and these services rendered afterwards were without any special contract other than the three year contract; that no recovery could be had upon a *quantum meruit*, there being only an implied contract for services upon the terms of the previous written contract, the terms of which are not shown, and therefore there could be no recovery at all. Before the ruling upon this motion, by agreement of parties, the defendant offered the evidence of Dr. Longwell, president of the defendant college, who identified the prior written contract of employment between plaintiff and defendant from September 1, 1907, to September 1, 1912, at \$1,500 per year, and by agreement, the contract was offered in evidence. This written contract was complied with by both parties. Dr. Longwell also testified as to the conversation between plaintiff and himself in regard to the employment of plaintiff after the expiration of the written contract from September 1, 1912, which will be later referred to. Thereafter, defendant's motion was sustained and judgment rendered against plaintiff for costs. Plaintiff appeals.—*Reversed*.

Dunshee & Haines, for appellant.

R. L. Parrish, for appellee.

PRESTON, J.—1. There is a controversy between counsel as to whether the trial court did or should have considered the testimony of Dr. Longwell, introduced pending the motion for a directed verdict. It does not appear whether or not defendant had introduced all its testimony. It is stated in argument that the testimony of this witness was taken as a matter of accommodation, because the witness could not be present later. We do not know whether the court considered the testimony thus introduced on behalf of defendant or not. If the court did not consider it, then, for reasons stated later in the

1. APPEAL AND
ERROR: di-
rected verdict:
evidence con-
sidered: pre-
sumption.

opinion, we think there was a jury question on the undisputed evidence of plaintiff. If the court did consider the defendant's evidence, as we assume it did, because the evidence was offered and received before the ruling, then we think there was a conflict in the evidence of plaintiff and defendant for the determination of the jury.

2. Defendant in its answer admitted the payment of \$1,650 and alleged that this was all plaintiff's services were worth, and filed a counterclaim alleging that about September

2. APPEAL AND
ERROR: con-
tract of em-
ployment:
master and
servant: di-
rected verdict.

1, 1912, the prior written contract was extended by verbal arrangement, by which plaintiff was to continue in the employ of defendant for a term of three years more upon substantially the same conditions, except that plaintiff was to have, during the first year, a salary of \$1,800, the second year, \$1,900, the third year, \$2,000 per annum; that plaintiff entered upon the performance of said verbal agreement, but left the employment of defendant and repudiated the contract, causing defendant damages for the breach thereof in the sum of \$200.

Plaintiff demurred to the counterclaim on the ground that the three-year verbal contract was void under the statute of frauds. The demurrer was sustained. It is contended by appellee that plaintiff, having induced the court to hold such a contract void, may not change his position and now rely upon the same contract. But we do not understand plaintiff to claim there was a three-year contract, or to rely thereon. His contention is that the contract between plaintiff and defendant is enforceable for the year during which plaintiff performed services for the defendant, at the rate of \$1,800 per year. Plaintiff testified:

"During the year commencing September 1, 1912, and ending September 1, 1913, I was teaching in Highland Park College. I know the reasonable value of such services. They were worth \$3,060. About the first of September, 1912, I

talked with Acting President Dr. Longwell; I was asked how much salary I wished, and I told him \$2,000 a year. To this he replied that it was too much, but he would give me a sliding scale for three years, beginning with \$1,800, then \$1,900, and finally \$2,000. There was nothing definite stated as to how long I was to remain with the college. There was no written agreement between the college and myself after my talk with Dr. Longwell. August 30th, upon receipt of a telegram from St. Louis, I handed in my resignation to take effect September 1st. At first Dr. McGill said he would not let me go, but upon my stating further circumstances he accepted my resignation and wished me well and God-speed."

Dr. Longwell, whose testimony was taken under the circumstances before indicated, testified in regard to this conversation and gives it substantially as plaintiff, except that he says:

"As I remember, Mr. Hahnel said he thought that he ought to have the \$2,000, but that he was willing to accept the contract on the sliding scale. Q. That is, for three years? A. For three years. If plaintiff had simply stayed one year, I should not have considered his services worth more than \$1,600. I make the distinction between working for three years and one year because we plan ahead, and if we can have a man two or three years, or five years, we can get more income than to have a man just for one year and the students don't know whether he is going to be there the next year or not."

It will be noticed that the testimony of defendant's witness, Dr. Longwell, was introduced after plaintiff's demurrer to the counterclaim was sustained, and the defendant is the one who is now claiming that the contract was for three years, if there was any contract at all.

3. It is contended for appellee that where a contract is entered into by which one person agrees to perform ser-

for the three-year term. Plaintiff did perform services for the first year and was paid at the rate of \$1,800 per year. Defendant itself seems to have placed the same construction upon the contract as we have given it, at least for the first year, and we think plaintiff has an enforceable contract for the year in question; at least it was a question for the jury under proper instructions, had they adopted plaintiff's version that no definite time was agreed upon. We do not, of course, know what the evidence will be on another trial. We have discussed the question on the record as now presented. As before indicated, under the evidence of either plaintiff or defendant, there was a jury question, under proper instructions.

5. There is another phase of the question as to the three-year parol contract and the statute of frauds. This has not been argued, but is barely suggested by counsel for one of the

<p>8. FRAUDS, STATUTE OF: parol contract of employment: taking contract out of statute: part performance.</p>	<p>parties. Even though it be conceded that the parol contract was within the statute, it would not be a void contract in the strict sense of the word, but a contract which could not be proven; that is, the statute provides, substan-</p>
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tially, that evidence as to such contract is not admissible unless it is in writing. Assuming that the testimony with reference to the conversation was inadmissible against proper objection, nevertheless it was admitted, and now the record shows that there was an understanding both on the part of plaintiff that he was not giving his services at the rate of compensation fixed in the old written contract, and on the part of Dr. Longwell that the college was not receiving his services on the basis of the former compensation. On this theory, the contract has been proven by the defendant, and that is its contention: that there was a three-year contract. The testimony of Dr. Longwell went in after the court had sustained plaintiff's demurrer to the counterclaim. The defendant has not appealed from that ruling or any other.

6. We have held that contracts for services partly per-

formed are, to the extent of the performance, taken out of the statute. *Murphy v. DeHaan*, 116 Iowa 61.

7. In view of what has been said, it is, perhaps, unnecessary to discuss the question of *quantum meruit*. We shall not do so at any length. The second count is on the theory of recovering in the absence of a special contract for the reasonable value of the services performed. Counsel for appellee concede that this would be a feasible theory, except for the presumption which exists that the plaintiff's services were to be remunerated at the same rate as under the expired term. It is appellee's theory that, because of this presumption, the plaintiff cannot recover on a *quantum meruit*. We have already indicated that, as we view the record, the presumption does not obtain. The appellant's motion to strike the additional abstract is overruled.

For the reasons given, the judgment is—*Reversed*.

DEEMER, C. J., WEAVER and EVANS, JJ., concur.

S. M. HENDERSON et al., Appellants, v. THE BOARD OF SUPERVISORS OF POLK COUNTY, et al., Appellees.

DRAINS: Drainage District—Efficiency—Benefits Commensurate
1 **with Costs.** Evidence reviewed and held to show that the drainage scheme in question was practicable and would benefit the lands to an appreciable extent.

APPEAL AND ERROR: Preparation of Appeal—Rules—Violation—
2 **When Penalized.** A violation of the rules governing the preparation of abstracts, arguments, etc., made in a good-faith effort to aid the court, will not necessarily be penalized. (Rule 53.)

PRINCIPLE APPLIED: In presenting an appeal from an order establishing a drainage district, the appellant included in his brief a condensation of the testimony of each witness. Such condensation did aid the court in arriving at the state of the evidence. *Held*, appellant should not be penalized.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

FRIDAY, JUNE 18, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

IN the district court, this proceeding was an appeal from an order of the board of supervisors establishing a drainage district. Upon hearing had, the order of the supervisors was confirmed by the district court. From such order of the district court, this appeal is prosecuted.—*Affirmed.*

Thos. A. Cheshire, for appellants.

John J. Halloran and *E. J. Kelley*, for appellees.

EVANS, J.—I. The proposed district comprises between 1,000 and 1,100 acres of land adjacent to the Skunk River. The proposed ditch will be about three miles in length and its estimated cost will be between \$10,000 and \$11,000. The proposed district comprises certain low, flat lands lying on the west side of the present Skunk River. The width of the tract varies from ninety rods to three-quarters of a mile. This tract is bounded on the westerly side by certain high land, or hills. On its easterly side, it is bounded by the Skunk River, or the Skunk River ditch, as it is called in the record. It appears that about thirty years ago, an artificial ditch was constructed to take the flow of the river. This ditch was laid in a practically straight line. It has been effective to take all of the flow of the river, and the old river channel has been thereby superseded. Between this river ditch and the hills to the west, there is a considerable body of land which is lower than the banks of the river ditch. It contains also many depressions. The water from the hills is naturally thrown upon this low land. It finds its way into the depressions and becomes stagnant. In case of flood overflowing the banks of the main stream, a like result follows. The proposed plan contemplates an additional ditch which shall run practically parallel with the main stream for a distance of about

1. DRAINS : drain-
age district :
efficiency :
benefits com-
mensurate
with costs.

three miles and which shall discharge into the main stream at its lower terminus. The purpose to be subserved is the draining of these stagnant pools.

The appellants are owners of some of the lands included in the district. The general nature of their objections is that the scheme is impracticable and that the benefit, if any, to be derived is not commensurate with the expense to be incurred. It is shown that the fall is slight and that the current will necessarily be somewhat sluggish. As indicated by the elevations along the grade line or bottom of the ditch, the fall will be about three feet to the mile. The objections of the appellants may be summarized into two general propositions: (1) That the fall along the course of the ditch is so slight that it will immediately fill with the silt deposits as a result of the sluggish flow; and (2) that, though the ditch be constructed as proposed and be kept open and free from the natural obstructions of silt deposits, it cannot be effective to drain the lands involved.

The issue between the parties as presented here is purely one of fact. The conflict of evidence is largely a contest of expert opinion. Such expert opinion is necessarily largely hypothetical. Six engineers have testified on behalf of the appellants and four have testified on behalf of the public authorities. There is something to be said candidly for both sides of the controversy. The water that comes down from the hills comes with considerable velocity until it strikes the low land here involved. When it loses its velocity at the foot of the hill, it naturally precipitates its silt. It is contended, therefore, for the appellants that this silt will immediately fill the ditch and render it useless. It appears, also, that the main stream is subject to considerable overflow. Such overflow also naturally precipitates its silt when its waters are released from the swifter current of the main stream. It appears that the banks of the main stream are about two feet higher than the great body of land farther away. This high elevation of the banks is effective to create the pools already

referred to. Whether this higher elevation of the banks has been caused by the deposit of the silt or whether it has been caused in part by remnants of the soil banks made by the original construction is somewhat in dispute. It is the contention of the appellants that this elevation has been caused by the deposit of silt and that the same deposit will fill the new ditch proposed. The engineers on both sides agree that the overflowing waters of a stream will always deposit the greatest amount of silt next to the stream. This is so because the water loses its current velocity when it escapes over the banks and the loss of velocity causes the precipitation.

Assuming that the higher elevation of the banks in this case is the result of silt deposits from the overflow of the main stream, the fact remains that silt deposits have never heretofore extended far beyond such banks. It is contended for the appellants, also, that the water which comes from the hills is heavily charged with silt and that this will necessarily be discharged into the new ditch. It appears that there are various ditches and ravines which discharge the water from the hills onto the low ground. It is urged for appellants that these ditches have invariably filled with silt. Such filling, however, appears to be at the base or toe of the hill in every case. The effect of this is to build up the land at the base of the hill and at the outer edge of the low ground.

Taking the testimony of all the engineers pro and con, we are impressed that no great amount of silt has ever reached the lower ground along which the line of the proposed ditch is to run, and this is one reason why it is low ground. If there had been silt enough to build up the ground to as high an elevation as the banks of the stream, the particular drainage problem now presented would be more simple. It is true that this proposed ditch must be more or less sluggish according as the water in the main stream shall be high or low. At the outlet, there must be more or less backwater, and this will tend to the deposit of all the silt

which the water contains. On the other hand, we are quite satisfied, also, that the problem of clearing the stream and keeping it open will not be a difficult one.

As to the efficiency of the proposed ditch at its best, it is urged that it cannot prevent the usual overflows of the main stream and that therefore it can be of no effective service for the purpose of drainage. It is undeniably true that the proposed ditch will have no influence whatever to prevent the overflow in times of flood of the main stream. Nor could it serve any particular function during the period of an overflow. If we were to assume a perpetual flood overflowing such stream, then it could truly be said that the proposed ditch could render no service whatever. But the flood is not perpetual. The very purpose of the proposed ditch is to carry away the pools of residue which would otherwise be left after the flood has passed by and after the stream has returned to its banks. Granting that the proposed ditch cannot be effective to render all the low land tillable, the fact remains that it will render some of it tillable and that it will render much, if not all, of it more useful for meadow and pasture purposes. In other words, it will benefit the land to an appreciable extent. It appears that similar ditches have been heretofore constructed for similar purposes along the line of the Skunk River. Some of them have been constructed in the same county as the present proposed ditch. It is in dispute between the parties as to whether such ditches have been successful or not. Their practical efficiency, such as it was, came within the observation of the board of supervisors which acted upon the present petition. It appears also, as already indicated, that the main stream of the Skunk River has been carried by an artificial ditch for more than thirty years. Such main ditch is more than 14 or 15 miles long in this part of the course. This main ditch has been efficient and has gradually enlarged and deepened itself. So far as its grade line is concerned, it cannot be materially different from the grade line of the proposed ditch. These are prac-

tical facts which are open to observation and are entitled to their appropriate weight in reaching a conclusion as to the probable efficiency of the proposed ditch. It may be true that the land at the head of the ditch may gain a greater benefit therefrom than that nearer its outlet. Even then, such inequality, if any, can be met in the assessment of benefits.

Upon the whole record, we are satisfied that the board of supervisors was justified in reaching a conclusion favorable to the establishment.

II. Some dispute is presented in the briefs as to the method of presentation adopted by the appellants and we are asked by the appellees to penalize the appellants there-

2. **APPEAL AND ERROR: preparation of appeal: rules: violation: when penalized.** for. The record as presented in the abstract is very voluminous. The appellants have included in their brief a condensation of the testimony of each witness so far as the same bears upon the material points of the case. It was done with a view of reducing the labor of the court in arriving at the state of the evidence. The appellees deny the correctness of the condensation *in toto*, and ask that we disregard the same and penalize the appellants therefor. We see no reason for questioning the good faith of appellants' counsel in the method adopted. It has been an aid to us in arriving at the real state of the evidence. It was, of course, open to the appellees to point out omissions or inaccuracies, if any, and this would have been of equal aid to us. A mere sweeping denial in such case is not as helpful as specifications.

For the reasons already indicated, the order of the court below must be—*Affirmed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

JESSEN LIQUOR COMPANY, Appellant, v. PHOENIX DISTILLERY
COMPANY et al., Appellees.

REPLEVIN: Nature of Action—Off-sets—Issues Allowable. Mat-
1 ters which are not pleaded and which cannot properly be pleaded
in an action of replevin (Sec. 4164, Code, 1897) cannot be de-
terminative of the right to maintain the action.

PRINCIPLE APPLIED: Defendant, as agent of plaintiff,
shipped plaintiff's property to him (plaintiff), but in so doing
made advancements for the plaintiff and claimed the right to
the possession of the property until the advancements were paid.
Plaintiff brought replevin, simply claiming absolute ownership
and the right of possession. At the trial, plaintiff attempted to
neutralize defendant's claim for advancements by showing that
defendant was indebted to plaintiff on a former and different
transaction. *Held*, such matter was wholly immaterial because
plaintiff (a) did not plead it, and (b) could not properly plead
it under Sec. 4164, Code, 1897.

PRINCIPAL AND AGENT: Lien of Agent—Expenses and Advance-
2 **ments—Replevin.** An agent has a particular lien upon the goods
of the principal lawfully in his possession as agent for the
amount due him as agent in respect to the property subject to
the lien.

PRINCIPLE APPLIED: The principal bought eleven barrels
of whisky in bond, agreeing to pay the Federal revenue tax when
it was unbonded. He directed his agent to pay the tax and draw
draft with bill of lading. The agent did so, attaching the draft
to the bill of lading. The principal refused to pay the draft.
Held, the agent had a lien on the whisky both (a) at common law
and (b) under the express terms of the correspondence.

JUDGMENTS: Form—Replevin. It is immaterial that the final
3 judgment in a replevin action was labeled a "decree," the matters
therein contained being such as the law commanded. The law
concerns itself with the substance, not the shadow of things.

Appeal from Pottawattamie District Court.—HON. E. B.
WOODRUFF, Judge.

MONDAY, JUNE 21, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION in replevin to recover the possession of personal property. Trial to court without jury. Judgment for defendant and plaintiff appeals. The facts are stated in the opinion.—*Affirmed.*

Mayne & Green, for appellant.

W. S. Stillman, for appellees.

WEAVER, J.—The defendant distilling company, doing business at St. Louis, Missouri, owned quantities of barrelled whisky stored in a government warehouse at that place. In July, 1912, defendant sold to the plaintiff, a dealer in Council Bluffs, eleven barrels of whisky and received payment therefor at the agreed price. The sale was made in bond and subject to the payment of the Federal revenue tax by plaintiff. The transaction was evidenced by the delivery by defendant to plaintiff of warehouse certificates or receipts for the requisite number of barrels, the intention being that the goods would be withdrawn from storage by the plaintiff at its convenience or upon its order and the payment of the revenue tax. About the time of the sale or soon thereafter, plaintiff called for and received six barrels of the whisky and paid the tax thereon. On September 13, 1912, plaintiff wrote to defendant, enclosing the warehouse receipts for the remaining five barrels, and saying:

“Enclosed find warehouse receipt for 5 bbls. Please pay tax and ship us these five bbls. reduced to 95 proof. Draw on us through the Commercial National Bank with B/L for the tax. Please do not delay as we have the most of it sold.”

On September 14, 1912, the defendant acknowledged receipt of the letter and added:

“To facilitate your unbonding we would kindly ask you to send us your check for \$250.00 to cover the government tax which is approximately the amount on five barrels of whisky. Whatever the difference may be, should there be any we shall account for same.

“The distillery is now unbonding hundreds of barrels of whisky each day which means an outlay of thousands of dollars for the government tax and they have therefore now made a strict rule that the government taxes must be sent in before the whisky is unbonded.

“Kindly send us in your check at once so that there is no delay for you in getting your goods.”

To this the plaintiff responded as follows:

“This is a unusual request we have unbonded many a hundred bbls. of whisky and this is the first instant that we ever was called on to advance the money for unbonding. We will pay draft with B/L and if you won't do that send us the original warehouse receipt and we will unbond it ourself at the distillery. Hoping you will attend to this at once, and oblige.”

Thereupon, the defendant closed the correspondence with a letter to the effect that it would attend to the matter of unbonding the whisky as requested and draw on plaintiff for the amount of the tax. Defendant then proceeded to pay the tax on the liquor, \$248.19, and having forwarded the shipment to Council Bluffs, sent the bill of lading, accompanied by a draft for that amount, to a bank for collection and delivery. The shipment having reached its destination, plaintiff paid the freight charges, but as it refused to pay the draft except upon a reduction of an amount to cover damages alleged to have been sustained because the first shipment was of a poorer grade or quality of whisky than it purchased, the bank declined to deliver the bill of lading and the railway company held the goods, awaiting settlement

of the controversy. The plaintiff then brought this action, claiming to be the unqualified owner and entitled to the possession of the goods, which it alleged were wrongfully detained by the carrier under instructions from the defendant distillery company to withhold delivery until plaintiff paid its demand. It was further alleged that the sum so demanded was not due or owing the distillery company and that the possession of the goods was wrongfully retained for the purpose of forcing the plaintiff to pay an amount of money which it did not owe. The distillery company appeared to the action and answered and pleaded the facts of the transaction substantially as we have stated them and asserted its right to withhold the delivery of the shipment until plaintiff had repaid the amount of money which defendant had advanced to take the goods out of bond. A jury was waived and cause tried to the court, resulting in judgment for defendant, as already indicated. There is little or no substantial dispute concerning the facts set out in the foregoing statement.

Upon the trial, in justification of its refusal to pay the amount of the draft, plaintiff introduced evidence tending to show that the warehouse certificates for the eleven barrels of whisky described the same as having been put in bond in the year 1909; but that when defendants, at plaintiff's request, unbonded and shipped the first six barrels, they proved to have been bonded in 1911; and that the difference in age made a difference in the market value of the whisky to the amount of 30 cents per gallon, and plaintiff was damaged to that extent. Whether there has been any dispute or controversy between the parties over this alleged difference in age and value of the whisky is not shown in evidence, but it is conceded that plaintiff requested and procured the defendant to pay the tax upon the last five barrels for the undisclosed purpose of getting possession of them and thereby forcing the defendant to seek its remedy in the courts of this jurisdiction, if it is desired to contest the claim for damages. Upon the record so made, the trial court found for the

defendant and entered judgment against plaintiff for a return of the property taken on the writ, or in default thereof, for the recovery of the full amount of the draft and for costs.

The one question presented is whether, upon the undisputed facts, the plaintiff was entitled to the possession of the property without paying the amount of the defendant's draft which accompanied the bill of lading.

I. It will be observed from the foregoing statement that the issues disclose an ordinary action in replevin, in which the plaintiff asserts absolute ownership and right of possession of the goods described and the defendant

1. REPLEVIN: nature of action: off-sets: issues allowable. ant pleads a right of possession until it is repaid the money which it advanced, at plaintiff's request, in obtaining such possession from the bonded warehouse. The controversy between the parties over the first shipment is not mentioned in the pleadings, and plaintiff's claim for damages in that transaction is nowhere pleaded or put in issue. Indeed, under our practice act, as is well understood, there can be no joinder of causes of actions not of the same kind in an action of replevin, nor is any counterclaim allowed. Code, Sec. 4164. For the double reason, then, that the question of damages to plaintiff on account of matters relating to the first shipment is not put in issue by the pleadings, and that such issue could not properly be joined with an action for replevin of the goods constituting the second shipment, it must be held that plaintiff's right, if any, to recover damages of that nature is in no manner determinative of his right to maintain this action.

II. The one question to be determined in replevin is the right to the possession of the property in dispute at the time the action is commenced. That plaintiff had then the general ownership may, for the purposes of this case, be conceded, and this ownership carried with it the right to possession unless, under the admitted facts, defendant could properly retain the possession in its own hands or in the hands of the

2. PRINCIPAL AND AGENT: lien of agent: expenses and advancements: replevin. ownership may, for the purposes of this case, be conceded, and this ownership carried with it the right to possession unless, under the admitted facts, defendant could properly retain the possession in its own hands or in the hands of the

carrier until repaid the advancements it had made. That it had such right of detention is not open to reasonable doubt. In the first place, an agreement that defendant might thus secure itself for its advances is implied, if not expressed, in the written agreement which is evidenced by the letters passing between the parties. The duty to pay the tax rested upon the plaintiff and not upon the defendant. In withdrawing the goods from bond, the defendant was acting as the agent of plaintiff, and there is no better settled principle of the law of agency than that by which, where an agent is entitled to compensation or reimbursement on account of advances made at the principal's request, and the property of the principal with reference to which the advancement has been made is in the agent's hands, he has a lien thereon for the amount which entitles him to retain the possession until his claim is paid. In 1 Clark & Skyles on Agency, Sec. 373, the rule is stated as follows:

“An agent who performs services for another, and as a result thereof comes into the possession of property or funds for his principal, has a lien on such property or funds for his compensation, advances and expenditures in the transaction; or, in other words, he has a right to retain such property or funds until his claim . . . is satisfied, provided his services, advances and expenditures were proper, necessary and incidental to his due execution of the agency.”

Other authorities need not be cited in support of this elementary principle. Assuming, as we must, that the parties knew the law in this respect and were doing business with reference thereto, it must be said that plaintiff, by requesting the defendant to pay the tax and forward the goods, made the defendant its agent for that purpose and clothed the latter with the right and authority to assert a lien upon the goods for its advances. Moreover, the plaintiff's letter asking the defendant to make the advance and send draft for the amount with bill of lading may fairly be construed as

express authority to hold the possession of the goods until the advances were repaid. Plaintiff must have well understood the common custom and usage of the business world by which a shipper who desires to avoid risk of nonpayment of his charges upon goods shipped to a consignee sends the bill of lading accompanied by a draft for the amount of such charges to a bank or other correspondent, with directions to deliver the bill only upon payment of the draft. In such case, the shipper retains a qualified title or interest in the shipment to secure payment of his claim, and as a general rule at least, neither the carrier nor the bank has any authority to deliver the goods or surrender the bill of lading until the draft is paid; and until such payment is made, the consignee has no right of possession upon which to sustain an action in replevin. In explicitly directing and authorizing the defendant to ship the goods and send draft with bill of lading to the bank for collection, and in again promising to "pay the draft with B/L," plaintiff assumed an obligation to take up the draft as a condition precedent to the delivery of the shipment. That promise is not redeemed or fulfilled by saying to the defendant or its correspondent bank that the plaintiff has an unliquidated claim for damages to an amount which, if allowed, will be equal in whole or in part to the draft, of the acceptance of which it had given repeated assurance. We may also add that the fact that, in all this correspondence, plaintiff studiously avoided any mention of its claim for damages upon the first shipment and that it repeatedly promised to pay the draft with bill of lading, while cherishing a secret purpose not to pay more than a fraction thereof, and that it knew, as it must have known, that, if such purpose were understood by defendant, it would have promptly refused to make the advancement at all, clearly evinces an intent to mislead, and it is but just that the agreement so procured be enforced in the sense and to the extent which plaintiff knew it was understood by the defendant.

III. Plaintiff seems to labor under the impression that

defendant is here asserting a right to be subrogated to the lien which the government of the United States held upon the barrels of whisky for the payment of the revenue tax. We do not understand the defendant to urge any such right or claim, and for the purposes of this case we may assume that there can be no such subrogation. But, as we have said already, the common-law right to a lien (which is here nothing more than a right under certain circumstances to retain possession of an item of personal property until the claim of the possessor for some service or expense or advancement with reference to such property has been satisfied) is one which the defendant may, in this case, properly invoke. When this action was begun, defendant's claim had not been paid, and the lien therefor still attached. Plaintiff having failed to establish its alleged right of present possession at the time this action was begun, the judgment for defendant was properly entered.

Complaint is made that, while this is undoubtedly an action at law, the court below entered a decree as in equity. The fact that the record entry is labeled "decree" is immaterial. The substance of the entry is a judgment at law that plaintiff is not entitled to recover the possession of the property and that defendant be awarded a return thereof, in default of which it shall recover the value of its interest therein, which is the amount of the advancements made at plaintiff's request, and for costs. This is the ordinary judgment in replevin cases where the finding or verdict is against the plaintiff, and we discover nothing therein to which any just exception can be taken.

It follows that the judgment below must be and it is hereby—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

JEWETT LUMBER COMPANY, Appellee, v. MARTIN CONROY
COMPANY et al., Appellants.

BILLS AND NOTES: Construction—Difference in Understanding of

1 **Terms.** The principle "that when the terms of an agreement have been intended in a different sense by the parties, that sense is to prevail against either party in which he had reason to suppose the other understood it" (Sec. 4617, Code, 1897) cannot prevail over the plain and definite language of the writing and the equally definite conduct of the parties out of which the writing arose.

CONTRACTS: Consideration—Sufficiency—Bills and Notes. A con-
2 sideration sufficient to support a contract is (a) either a benefit moving to the promisor or (b) a detriment agreed to be suffered by the promisee.

PRINCIPLE APPLIED: A school district was owing C, its principal contractor, for the erection of a schoolhouse. C had let part of the work to L, and an action was pending in court between C and L as to the amount, if anything, due L from C. L was owing J for material used in the building and J, claiming he could hold whatever sum was due to L from C, perfected a claim for a lien on the funds in the hands of the district. In this condition of conflicting interests, C gave his promissory note to J for the amount L was owing J, and J then released all claim on the fund in the hands of the district, and C received his money from the district. *Held*, the consideration for the note was ample.

Appeal from Polk District Court.—HON. CHARLES A. DUDLEY,
Judge.

MONDAY, MAY 10, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION at law to recover in the first count upon an account, and in the second count upon a note. Trial to the

court without a jury. Judgment for plaintiff on both the account and the note. Defendants appeal.—*Affirmed.*

John T. Conroy and A. A. McGarry, for appellants.

Frank N. Jacks and Marion B. Seevers, for appellee.

PRESTON, J.—The defendant, Martin Conroy Company, is a partnership, and Martin Conroy and J. C. O'Donnell are the partners. About June 12, 1909, plaintiff and defendant company entered into a verbal contract to furnish lumber and materials for a school building; under such agreement they furnished lumber and other materials as ordered by defendant company and delivered same to defendants at the building. The amount claimed on the account is \$284.08, with interest. The second count is upon a note in the following form:

\$678.65

Des Moines, Ia., October 1st 1910.

On or before the First day of March, 1911, for value received, We promise to pay to JEWETT LUMBER COMPANY, or order SIX HUNDRED SEVENTY-EIGHT & 65-100 DOLLARS, At their office in Des Moines, with interest at eight per cent per annum, payable semi-annually:

And interest and principal in arrears shall draw eight per cent till paid; and in case non-payment of interest when due, or any other payments as herein agreed, the whole sum of principal and interest to become due and collectible at the holder's option. If this note is not paid at maturity, the undersigned agree to pay the expense of collection, including attorney's fees. Any justice of the peace shall have jurisdiction in rendering judgment to the amount of three hundred dollars. Makers and endorsers waive demand, notice and protest. This note is given for lumber used in the improvements and if the case of *Lair & Kirkendall vs. Martin Conroy Co.* now pending in the district court of Polk county, Ia. is not settled or tried in said court by the time this note be-

comes due, we Jewett Lumber Co. agree to extend the time until said suit is determined, said extension in no event to exceed one year. Recovery on this note is not dependent upon the outcome of said suit.

(Signed) MARTIN CONROY CO.

Per M. Conroy.

P. O. Not transferable

The trial court made findings as follows:

1st. I find as a fact that prior to the sale of material by the plaintiff to the defendants to be used by them in the construction of the Hubbell School building for the Independent School District of Des Moines plaintiff had furnished the defendants with a quotation or price list for certain material to be used by the defendants.

2nd. I further find that the material charged in Exhibit A is not in accordance in all particulars with this price list. That it should be figured in accordance with said price list and computing the material set forth in Exhibit 1 as the price list shown the amount had for material in Count I of the petition is \$249.71 on which plaintiff is entitled to interest at 6% from the 1st day of July, 1912, to this date making an aggregate due from defendant to plaintiff upon Count I of \$269.97.

3rd. I further find that the defendants had a contract with the Independent School District of Des Moines, to erect and furnish the material there for two school buildings, named the Oakland and the Hubbell school buildings and that Lair and Kirkendall entered into a contract with the defendants to plaster and furnish the material for the plastering of said buildings, that the contract price for said plastering of the Hubbell school building between Lair and Kirkendall and the defendants was \$2472 and for the Oakland school building the contract price was \$1253.

4th. I further find that including the payment of \$600.00 the defendants by Lair and Kirkendall on account of the

Hubbell school building the sum of \$2465.75 and on account of the Oakland schoolhouse \$139.43. These payments exaggerated by reason of extras something more than the contract price for the plastering of said buildings.

5th. I further find that the defendant knew that the plaintiff was furnishing material to Lair and Kirkendall for plastering both of said school buildings and also had knowledge of that fact at the time of the payment of \$600.00 in June, 1910.

6th. I further find that the plaintiff within thirty days after the furnishing of the last material for the said Hubbell school building gave notice to the Independent School District of its claim for material furnished to the sub-contractors, Lair and Kirkendall and the defendants as by statute required.

7th. I further find that some time prior to October 1st, 1910, the plaintiff was making efforts to secure money from the defendants on account of material sold to Lair and Kirkendall. That there were efforts made on or about said date to obtain a settlement or satisfaction between Lair and Kirkendall and the defendants and that prior to this date a note was made for the above amount and offered to the plaintiff, containing a condition that the amount of the note should be subject to the outcome of the suit of Lair & Kirkendall vs. the defendants. But the plaintiff declined to accept said note and would only accept the note set out and described in Count II of the petition.

8th. I further find said note being paid at maturity, the defendants have had the benefit of the extension of more than one year for the payment of said note.

9th. I further find that at the time the note was given October the 1st, 1910, that Lair & Kirkendall for material furnished for plastering the Hubbell school building was indebted to the plaintiff in the sum mentioned in said note to wit, \$678.65.

10th. I further find that at the time the \$600.00 payment

was made to wit June the 9th, 1910, the firm of Lair & Kirkendall was indebted to the plaintiff upon two counts. One for material furnished for the erection of the Oakland school building and one for material furnished for the erection of the Hubbell building and that there was nothing said about the application of the payment of the said \$600.00 and that said \$600.00 was applied by plaintiff so far as necessary to pay the claim of Lair & Kirkendall to plaintiff for material furnished for the Oakland school building and the balance applied to discharge the claim for material furnished for the Hubbell school building and that after making such application the balance remaining unpaid offered Lair & Kirkendall to plaintiff on the Hubbell school building was said sum of \$678.65.

11th. I further find that the firm of Lair & Kirkendall was largely indebted to the plaintiff on other accounts and for material furnished for purposes other than to erect the two said school buildings.

12th. I further find that the only condition attached to said note and the giving thereof is the one which is mentioned in the note itself. And that the right to recover upon this note does not depend upon the out come of the suit of Lair & Kirkendall against the defendants, No. 19470 Law.

13th. I further find that there was no settlement between Lair and Kirkendall and the defendants wanted the check for \$600.00 was given by defendants to plaintiff on account of Lair and Kirkendall.

14th. I further find that there is as between Lair & Kirkendall and the defendants an unsettled claim for extras furnished by Lair and Kirkendall for the plastering of the two buildings above mentioned, but the conclusion in this case shall not be an adjudication of any matters pending between said Lair and Kirkendall and the defendants.

15th. I further find that the payment by the defendants to Lair and Kirkendall of the contract price for the plastering and material furnished for said two school buildings is not a discharge or payment of the liability of defendants for

the material furnished by the plaintiff to said Lair & Kirkendall for the construction of said buildings.

As a conclusion of law the plaintiff is entitled to recover from the defendants upon Count I the sum of \$269.97 with interest at 6% from this date and upon Count II the sum of \$845.50 with interest at 8% from this date and attorney's fees and costs.

Judgment was entered in accordance with the findings.

1. Plaintiff furnished defendants a large amount of lumber and building material, amounting to several thousand dollars, and defendants made a number of payments, from time to time. Plaintiff had furnished defendants with a special price list, which appears in the abstract.

As to Count 1, the issue involved is a matter of computation; that is, to what extent, if at all, does plaintiff's account differ from the price list furnished defendants? Appellants' assignment of error is that the court erred in the amount found due the plaintiff on the first count. Many pages of the abstract and arguments are taken up with the account, one line of which is like this:

No.	Date	Item	Feet	Price	Amount
27	Dec. 2	22 5x10-14	1283	29.00	38.21

We are asked to go through the account and the evidence and make computations. The items are not all disputed. Many are. We have compared the disputed items with the special price list and are convinced that the conclusion reached by the trial court is correct.

2. The assignment of error as to the second count is that the court erred in finding that there was any consideration for the note in suit. It is said by appellants that there is a claim that plaintiff had a lien on the building for material, lumber and cement furnished to Kirkendall & Lair, and that no lien is given either by statute or law, citing Code Sec. 3102, and cases. That all the plaintiff, under its lien, Exhibit "C,"

could do was to hold such amount as was due Lair & Kirkendall from Martin Conroy & Company, and that Mr. Lair testifies that he was paid all of the contract price,—that is, the contract he had with Martin Conroy & Company; that therefore there was nothing due and there could be nothing due from Conroy & Company to Lair & Kirkendall; and that if this is so, they ask what was due for which the note was given. The testimony of Mr. Lair referred to is as follows:

“I have been paid over the contract price as far as the contract price. I had received over the contract price when I received the \$600.00 from Martin Conroy Company. We had a dispute about the \$338.00 due, the time we were trying to settle. We tried to make a final settlement of the extras and did not come to an agreement.”

But Mr. Lair also testified that there is still money due his company on this job, that there were some extras, and that there is due for extras a balance of \$1,170 or \$1,180.

1. **BILLS AND NOTES: construction: difference in understanding of terms.** They also cite Code Sec. 4617 as bearing upon this question, which provides that when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it, and claim that defendant intended this note to be only in the nature of collateral security for the amount due Lair & Kirkendall from defendants. The testimony shows that plaintiff refused to accept the note unless it expressly stated that it was not dependent upon the outcome of the case of Lair & Kirkendall v. Martin Conroy Company. A prior note was made, which plaintiff refused to accept. After the first note was refused, this one was given. It was executed and delivered by Martin Conroy in the presence and with the approval of his attorney. As before shown, the lower court found that the only condition attached to the note and the giving thereof is the one mentioned in the note itself, and that plaintiff's right to

recover does not depend upon the outcome of the suit of *Lair & Kirkendall v. Conroy*. We think that, under the evidence and the record, the trial court correctly construed the provisions of the note.

3. We are also of opinion that there was a valid and sufficient consideration for the note. The argument of appellants is that want of consideration may be shown as between the parties, and they cite Sec. 3070

2. CONTRACTS :
consideration :
sufficiency :
bills and notes.

of the Code and the decisions cited under that section. They say "this is so plain a proposition that we need not pursue it further; that by this law it is conclusively shown that *Lair & Kirkendall* did not owe anything on the contract price; that they did not directly or indirectly agree to pay for the extras. Then, not owing anything to *Lair & Kirkendall* on the contract price, the note was without consideration, as there was nothing on which to base the note."

But the record shows that by agreement plaintiff released the claim it had filed with the school district, and defendants gave plaintiff the note in question. A definition for consideration is that it is either a benefit moving to the promisor or a detriment agreed to be suffered by the promisee. *Kinhead v. Peet*, 136 Iowa 590, 595.

Both are present here. Defendants obtained the release of plaintiff's claim and received their money from the school district; plaintiff released his claim and relinquished all claims of receiving payment from the school district. Plaintiff gave up its right of litigating the questions of law and fact as to the effect of its claim.

In *Brown v. Jennett*, 130 Iowa 311, 312, we said:

"We think there are two answers to the contention for appellant that his agreement to pay the firm of H. L. Craven & Co. the sum of one hundred and fifty dollars was without consideration. In the first place, he entered into the arrangement with the understanding that the obligation of

Solid to the firm for a commission should be released by the firm and defendant's obligation substituted therefor. It is plain that, if the firm undertook to release Solid and accept defendant as their debtor for the amount of the commission, the firm incurred a detriment which would support defendant's agreement. *Whitesell v. Heiney*, 58 Ind. 108; *Millard v. Porter*, 18 Ind. 503; *Smith v. Finch*, 3 Ill. 321; *Flanagan v. Hutchinson*, 47 Mo. 237; *Smith v. Mayo*, 1 Allen (Mass.) 160. In the second place, the agreement of Solid, through plaintiff as his agent, that the contract between him, and defendant, whether valid or not, should be canceled and discharged, so that no further controversy could arise under it, was sufficient consideration for defendant's agreement to pay to H. L. Craven & Co. the obligation of Solid to them for the commission. If the agreement had been that Solid should relinquish the written instrument executed by him and defendant on Sunday, the consideration for defendant's promise would have been sufficient, although the contract evidenced by such instrument was not valid and enforceable. *Brooks v. Haigh*, 10 Ad. & El. 323. It is not necessary that the consideration be a thing of pecuniary value or reducible to such value. *Bainbridge v. Firmstone*, 8 Ad. & El. 743; 9 Cyc. 315; Wald's *Pollock on Contracts*, (3d Ed., by Williston) 193; Langdell, *Contracts*, Sec. 54. And the relinquishment by Solid of his right to litigate the question of law or fact as to defendant's liability under the contract of purchase was likewise a valid consideration. *Miles v. New Zealand, Alford Estate Co.*, (1885-86) 32 Ch. Div. 266; Wald's *Pollock on Contracts*, (3d Ed.) 214. And see *Richardson & Boynton Co. v. Independent District*, 70 Iowa 573; *Leach v. Keach*, 7 Iowa 232."

This language is quite in point. Lair & Kirkendall owed plaintiff money for materials used in the Hubbell and Oakland schools. Lair & Kirkendall were subcontractors in the erection of those buildings; the school district owed money to

defendants on said buildings; and plaintiff had filed a claim against the school district under Sec. 3102 of the Code. The one question of fact is involved whether defendants owed money to Lair & Kirkendall for work on these buildings. As before stated, Mr. Lair testified that defendants owed him a balance of \$1,170 or \$1,180, and prior to the making of the note, Lair & Kirkendall sued defendants for this amount, and this suit was pending at the time the note was given, also at the time of the trial below. If defendants owed Lair & Kirkendall anything on the buildings, plaintiff would have the right to insist on payment of the claim by the school district out of the money the district owed defendants. The question of defendants' liability to Lair & Kirkendall was not only in dispute, but actually in litigation. If Lair & Kirkendall should win their suit, plaintiff would be entitled to receive the amount of its claim from the school district, and it relinquished that right. Doubtful questions of fact arising from a conflict in the evidence are controlled by the findings of the trial court, the action being at law, and such findings have the force of the verdict of a jury.

Our conclusion is that the judgment of the trial court was right, and it is therefore—*Affirmed*.

DEEMER, C. J., WEAVER and EVANS, JJ., concur.

FRANK B. LEONARD, Appellant, v. E. R. ZWEIFEL et al.,
Appellees.

EXTRADITION: "Fugitive from Justice"—Facts Constituting.

- 1 The old rule that, to constitute one a fugitive from justice, he must actually flee from the state in order to avoid prosecution, has long ago been abandoned. A "fugitive from justice," within the meaning of Federal law, is one who commits a crime within one state jurisdiction and, when called upon to answer therein, is not there—that is, has removed, it matters not in what manner or for what purpose, to another state jurisdiction.

PRINCIPLE APPLIED: The accused, for several years, and in the course of his employment, collected money for his em-

ployer. On several occasions, he was short in his accounts. His employer rebuked him, but gave him time to make good his shortage, and even encouraged him to remain in his employ. The accused finally told his employer the amount of his shortage, and that he was going to Iowa to enter into other business in order to earn enough to make good the shortage. The employer did not object. Later, when the accused reached Iowa, he so informed his former employer and sent him a small payment. Extradition proceedings soon thereafter were instituted in the foreign state. *Held*, the accused was a fugitive from justice.

EXTRADITION: Guilt or Innocence of Accused—Duty of Governor.

- 2 It is not the duty or even the right of the governor to pass upon the question of the guilt or innocence of one sought to be extradited as a fugitive from justice. His duty is discharged when he determines (a) that an extraditable offense has been regularly charged and (b) that the accused was within the jurisdiction of the demanding state when such offense was committed.

EXTRADITION: Habeas Corpus—Motive of Prosecution. When a

- 3 requisition is made in due form and honored by the governor, it is not within the province of the court upon habeas corpus to inquire into the motive which actuates the prosecution in the foreign state.

Appeal from Polk District Court.—HON. C. S. BRADSHAW,
Judge.

WEDNESDAY, APRIL 7, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

THE plaintiff was charged with the crime of embezzlement committed in Wisconsin and proceedings for his arrest and prosecution were begun in one of the courts of that state. It appearing that plaintiff was then in Iowa, the governor of Wisconsin issued a requisition demanding his arrest and return to the latter state as a fugitive from justice, and the defendant Zweifel was named as agent of the state of Wisconsin to receive the accused and return him to that state for trial. The requisition was duly honored by the governor of Iowa, who issued a warrant upon which plaintiff was arrested and delivered to Zweifel, and thereupon a writ of habeas corpus for his release was sued out. A return to the writ

was made, showing the facts as above stated, and upon hearing the evidence, the trial court dismissed the proceeding and ordered the remand of plaintiff to the custody of the Wisconsin agent. Plaintiff appeals.—*Affirmed.*

Graham & Graham, for appellant.

Thos. J. Guthrie and Miller & Wallingford, for appellees.

WEAVER, J.—The evidence offered by appellant tended to show that for several years he was employed in Wisconsin as agent for one Whitney for the sale of pianos. On several occasions, his yearly settlement found him short in his account of collections made. Whitney rebuked him for his manner of doing business, but kept him in his service and gave him time to make the payment. Plaintiff at different times complained to Whitney that the business was becoming unprofitable and that he wished to change, but was encouraged to continue, until, in July, 1913, he announced to Whitney that he was going to Iowa, where he had opportunity to enter other business. He told Whitney he was short in his collections to the amount of several hundred dollars and that his reason or purpose in going was to enable him to earn or obtain the money with which to make the necessary payment. Whitney did not object. On reaching Des Moines, plaintiff informed Whitney of his location and sent him a small payment. Soon thereafter, Whitney instituted the criminal proceedings and later informed the sheriff where the accused could be found.

No objection is raised to the form or substance of the requisition papers, but it is denied that the facts show plaintiff to be a fugitive from justice. It is further said that the evidence clearly shows that the prosecution is an attempt to make use of the criminal law as a measure for the purpose of enforcing the collection of the debt due Whitney. Counsel say, though it does not otherwise appear in the record, that the governor

1. EXTRADITION:
"fugitive from
justice": facts
constituting.

of this state was strongly inclined to refuse to honor the requisition, and that the court was also of the mind to sustain the writ of habeas corpus, except for what seemed to be the decisive precedent found in the opinion of this court in *Taylor v. Wise*, 172 Iowa 1. It is conceded in argument that, under the doctrine of the cited case, appellant must be classed as a fugitive from justice under the meaning of the Constitution and the law upon the subject, but counsel submit that the decision is too sweeping and should be so modified or limited as not to include cases of this kind. In that case, Taylor left the state of Kansas under circumstances tending to negative the idea that he was absconding or seeking to escape prosecution, but we held that this alone did not relieve him from liability to extradition. We there said:

“The fact that he left the state of Kansas openly, or that when he left he did not do so in flight or with any intent to avoid arrest, is not a decisive consideration. If the act charged was in fact committed by him in that state, and when proceedings were begun for his prosecution he was found to be within the jurisdiction of another state, the question how or in what manner he made the change of residence is immaterial, and, if he declines to return voluntarily to meet the accusation made against him, he becomes a fugitive within the meaning of the law governing extradition of persons accused of crime.”

This holding then seemed to us, and still seems, to be not only a logical and legal necessity, if we are not to open an easy door to the practical nullification of the constitutional provision, but also to be required by the judicial construction which has been placed thereon by the court of last resort. In *Roberts v. Reilly*, 116 U. S. 80, speaking directly upon this subject it is said:

“To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is

not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding the prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.”

•
That the appellant in this case is a fugitive within the meaning which the Supreme Court of the United States has placed upon that term and the meaning which we ourselves have placed upon it, there is no room for doubt. He is charged with embezzlement committed within the state of Wisconsin. The courts of that jurisdiction alone have the power to try the question of his guilt or innocence. He is in the state of Iowa and, unless he voluntarily returns to the state of Wisconsin or is taken back under a warrant of extradition, he escapes trial, and, if in fact guilty, he escapes punishment. All the precedents seem to be quite in accord with our holding in the *Taylor Case* unless it be *In re Tod*, 12 S. D. 386, and in so far as that decision appears to hold otherwise, we think it cannot be approved. The clear purpose of the Constitution in providing for extradition is to prevent the individual states from becoming houses of refuge for persons charged with offenses against the laws of other states. Broadly speaking, the governor to

2. EXTRADITION:
guilt or inno-
cence of ac-
cused: duty of
governor.

whom a requisition is directed does not and ought not to attempt to pass upon the question of the guilt or innocence of the accused or the circumstances of the alleged offense, except so far as is necessary to determine that an extraditable offense has been regularly charged and that the accused was, at the date of such alleged offense, within the jurisdiction of the state from which the requisition issues. It is true that the governor to whom the requisition is directed is to some degree

his own interpreter of the Constitution, and extraordinary circumstances have sometimes arisen under which he has looked beyond the formality of the papers and proofs laid before him and refused to order an extradition because he believed it was not demanded in the furtherance of justice. Of the propriety or legality of the executive action in such cases, we are not here called to speak. The requisition has been honored, the executive warrant has been issued, and the accused is in the hands of the proper officer to be returned to Wisconsin. For the reasons stated, the propriety and correctness of the governor's finding that he is a fugitive cannot be successfully questioned.

Adverting briefly to the claim that the criminal law is being made use of by Whitney to coerce the payment of a debt, we think it must be said that, where a requisition is

3. EXTRADITION :
habeas corpus :
motive of prosecution.
made in due form and is honored by the governor of the state, it is not within the province of the court upon habeas corpus to inquire

into the motive which actuates the prosecution. However little credit it may reflect upon human nature, it is doubtless true that in very many, if not in a majority of cases where there has been a conversion of money or property by an employee or agent, the offense is condoned by the employer or principal if the debt is paid or made good, and that many of the cases actually prosecuted would never have been begun if the defaulting servant or agent or their friends had been able to right the financial wrong. Many other cases of a criminal character are instituted by complaining witnesses out of personal spite or in a spirit of revenge or malice. These facts, while pertinent as bearing upon the credibility of testimony, are never considered a sufficient reason for refusing to investigate a case or for discharging the accused if his guilt be fairly established. It is to be presumed that the accused will be given a fair trial in the jurisdiction to which he is returned and that the courts there will not permit themselves to be made the mere instruments of private malice.

The appellant may be entirely innocent of crime. The fact, if it be a fact, that he was repeatedly allowed to use for his own purposes the money of his employer may be found sufficient evidence of implied authority to so use the money in the instance complained of to justify a reasonable doubt of his guilt and call for his acquittal; but all these matters are for the consideration of the tribunal having jurisdiction of the case on its merits. It is manifestly impossible, not to say improper, to consider and pass upon such questions in a habeas corpus proceeding in a foreign state, and the trial court did not err in so ruling. The fact that the prosecuting witness may have known of the appellant's departure from Wisconsin or may even have consented thereto is of no moment except so far as it may bear upon the merits of the question whether he had not expressly or impliedly consented to appellant's use of the money. It cannot affect the validity of the warrant of extradition.

It follows that the order of the trial court remanding the appellant to the custody of the agent holding the warrant must be—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

WILLIAM LOUDEN et al., Appellants, v. J. P. STARR, Mayor,
et al., Appellees.

MUNICIPAL CORPORATIONS: Streets—Dedication—Acceptance—

- 1 **How Shown.** Acceptance of the dedication of a public street may be shown by use, and recognition on the part of the city and public generally. Written acceptance by way of ordinance or resolution is not exclusive. (Sec. 751, Code, 1897.)

MUNICIPAL CORPORATIONS: Streets—Vacation—Disposal of Va-

- 2 **cated Street—Review by Courts—Arbitrary Action.** A city or town has undoubted power to vacate a public street (Sec. 751, Code, 1897) and, after vacation, to dispose of the land as it deems best (Sec. 883, Code, 1897), even by conveyance, for instance, to a railway company; and the exercise of such powers will be interfered with by the courts only in a clear case of arbitrary and

unjust exercise of the power. In instant case, *held*, vacation not arbitrary.

PRINCIPLE APPLIED: Certiorari to annul the vacation of a street. A railway track and plaintiffs' place of business abutted on the west and east sides, respectively, of a north and south street, 66 feet wide, and not in general use by the public for travel. Plaintiffs, on the east side, were practically opposite the freight and passenger depots. A switch crossed said intervening street and furnished plaintiffs with adequate trackage. Neither the east and west street to the south nor the one to the north of plaintiffs' main buildings was opened across the railway tracks, the path of the one to the south being blocked by the passenger depot. The public would be served if the east and west street north of the passenger depot were opened across the tracks. The city vacated and conveyed to the railway company the west half of this north and south intervening street from the south line of plaintiffs' main building to a point some three blocks north, in consideration of the railway company's opening across its tracks the east and west street north of its passenger depot and maintaining the crossing. The railway company accepted the vacation and complied therewith. After the vacation and conveyance, no change appears to have been made in the use of the street. Plaintiffs yet had 33 feet of street to the west of their buildings, a street both to the north and to the south, and an alley on the east. *Held*, vacation was not arbitrary.

**MUNICIPAL CORPORATIONS: Streets—Vacation—Constitutional-
3 ity of Statute—Special Laws.** The legislative department, having plenary power over the highways of the state, may delegate to a city or town the power to vacate; therefore, Sec. 751, Code, 1897, investing *all* cities and towns with power to vacate, is not a *special* law within the meaning of Art. 3, Sec. 30, Constitution.

**MUNICIPAL CORPORATIONS: Streets—Vacation—Power Not Con-
4 ditioned on Prior Payment of Damages—Constitutional Law.** The "vacation" of a public street is not a *taking* of private property for public use within the Constitution, Art. 1, Sec. 18, even though, as a consequence of such vacation, an abutting property owner is damaged. Such vacation may be legally ordered without *first* having the consequential damages, if any, to abutting property, assessed and paid or secured; therefore, Sec. 751, Code, 1897, is not unconstitutional because containing no provisions for first assessing and paying the damages consequent on vacation.

Appeal from Jefferson District Court.—HON. FRANK
EICHELBERGER, Judge.

SATURDAY, OCTOBER 2, 1915.

ACTION in certiorari to declare void a certain ordinance passed by the defendant city vacating a certain street. Judgment for the defendants.—*Affirmed*.

Rollins J. Wilson, Leggett & McKemey, for appellants.

E. F. Simmons, City Solicitor, *J. P. Starr*, and *R. J. Bannister*, for appellees.

GAYNOR, J.—This is a proceeding in certiorari to have an ordinance of the city of Fairfield declared invalid. The issue tried was whether the city council exceeded its authority and acted illegally in vacating the west half of North Seventh Street and conveying the part vacated to the Chicago, Rock Island & Pacific Railway Company. The cause was tried to the court upon evidence taken in open court, and upon a final hearing, it was found that the ordinance in question was a valid ordinance; that the city council, in adopting the ordinance, was in the exercise of the powers granted by the legislature to the councils of cities and towns. The writ of certiorari, theretofore issued by the court, was quashed and the ordinance sustained. From this action the plaintiffs appeal.

The ordinance in question is known as No. 134, and is, so far as material to this controversy, as follows:

“Sec. 2. That all that part of the west one-half of North Seventh Street, between the south line of West Grimes Street and the north line of West Broadway Street in the city of Fairfield, Jefferson county, Iowa, be and the same is hereby vacated.

“Sec. 3. That all rights which may have been acquired by the public, in a certain way across the depot grounds of the Chicago, Rock Island & Pacific Railway Company between West Broadway Street and West Burlington Street in the city of Fairfield, be and the same are hereby surrendered and the said public way is hereby vacated.

"Sec. 4. That all that part of North Seventh Street in the city of Fairfield, Jefferson county, Iowa, which is vacated by section 2 of this ordinance be and the same is hereby granted to the Chicago, Rock Island & Pacific Railway Company for railroad purposes.

"Sec. 5. That there is hereby granted to the Chicago, Rock Island & Pacific Railway Company the right to maintain and operate a certain railway track, now located in North Seventh Street, commencing at or near the north line of West Broadway Street and extending in a northerly direction across West Briggs Street and then in a northwesterly direction to a connection with one of the tracks of said railway company. There is also granted to the Chicago, Rock Island & Pacific Railway Company the right to lay down and maintain a track along the east line of North Seventh Street, between the north line of West Briggs Street and the south line of West Grimes Street, and to cross North Seventh Street at or near the south line of West Grimes Street, the east rail of said track when constructed shall not be a greater distance than six feet from the east line of North Seventh Street. The said railway company is to have the right to connect said track with the track first mentioned in this section at or near the north line of West Briggs Street, or may build and operate said track independently from the aforementioned track. The right to construct and operate the said track, between the north line of West Briggs Street and the south line of West Grimes Street, is conditioned upon the said railway company first paying or satisfying the legal damages which may accrue to the abutting property owners.

"Sec. 6. In consideration to the foregoing grants, the said Chicago, Rock Island & Pacific Railway Company grants to the city of Fairfield, Iowa, a strip or tract of land sixty-six feet in width, over and across its depot grounds in the city of Fairfield including that part of North Seventh Street vacated by section two of this ordinance as an extension of and opening up of West Briggs Street in the city of Fairfield, Iowa, being the street opened up across the said depot

grounds under the terms of said ordinance number 124, and agrees to maintain reasonable safe and adequate crossings over said railway tracks for vehicles and pedestrians, which shall include the construction of approaches, plank crossing and cement walks, in accordance with the ordinances of the city of Fairfield, at the point where said West Briggs Street crosses its depot grounds. And said railway company also grants to said city any and all rights they may have obtained or acquired, under and by virtue of ordinance No. 124, to that part of the east half of North Seventh Street laying between the north line of West Burlington Street and the south line of West Grimes Street in said city. Nothing in this ordinance, however, shall be construed to prevent the said railway company from constructing and maintaining railway tracks across that portion of West Briggs Street granted to the city of Fairfield and operating railway trains thereover.

“Sec. 7. This ordinance shall not be effective until accepted by the Chicago, Rock Island & Pacific Railway Company by written acceptance to be filed with the city clerk within sixty days after the passage hereof, which written acceptance shall be entered on the records of the city as a part thereof and which written acceptance shall be construed and held as a grant to the city of Fairfield, Iowa, by said railway company of that part of its depot grounds in that city, sufficient to make an extension of West Briggs Street sixty-six feet in width over and across its said depot ground, subject to the terms of this ordinance and when said acceptance is filed as aforesaid, the same, together with its ordinance, shall constitute a contract between the said railway company and the city of Fairfield.

“Sec. 8. When the written acceptance of the Chicago, Rock Island & Pacific Railway Company is filed and entered of record, as required by Sec. 7 of this ordinance, then this ordinance shall be published by one insertion in the Fairfield Daily Journal, and this ordinance shall be in full force and effect from and after its publication.”

This ordinance and its conditions, so far as the railroad Company was involved, were duly accepted by the company on the 10th day of June, 1912.

It appears that the plaintiffs herein, as trustees for the Loudon Machinery Company, hold the legal title to the west half of Lots 2 and 3 in Block 4, and all of Lots 2, 3, 5 and 6 in Block 9 of Gage's Addition to the city of Fairfield, and are the successors in interest and privies in title to Electa W., Theodore S., Cranmore W. and Sarah J. Gage; that this land lies immediately east of and abuts on North Seventh Street, and is between West Broadway on the south and West Hempstead Street on the north; that there is a street running east and west between Blocks 4 and 9, known as Briggs Street.

If appears that, prior to the 9th day of August, 1870, the Gages were the owners of the land now owned by the plaintiffs, with other land, situated in the north half of the southwest quarter of Section 26, Township 72, Range 10; that on said 9th day of August, the Gages, being the owners of and then in possession of said land, sold and conveyed to the Chicago, South Western Railway Company a portion of the land then owned by them; that in the deed of conveyance it was agreed that each party to said deed should keep open for public use a street four rods wide along the east side of the tract therein conveyed, two rods in width to be taken from the land conveyed, and two rods in width from the land of the grantors adjoining this strip; and that North Seventh Street is the street referred to in said deed.

The plaintiffs allege in their petition that the street so set apart as North Seventh Street was dedicated to the public by the joint action of the Gages and the Chicago, South Western Railway Company. It appears that these plaintiffs are the successors in title from the Gages to the land now owned by them, and that the Chicago, Rock Island & Pacific

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Railway Company, mentioned in the ordinance, is the successor of the Chicago, South Western Railway Company.

We herewith attach a plat of a portion of North Seventh Street and the lots adjacent thereto on the east.

The railroad track on the east side of Seventh Street, shown on the plat, adjacent to plaintiffs' property, was placed there under and by virtue of an agreement entered into between the plaintiffs and the Rock Island Railway Company. The freight house of the Chicago, Rock Island & Pacific Railway Company is immediately west of plaintiffs' buildings, as shown upon this plat, and west of the street known as North Seventh Street. The passenger depot of the railway company stands across West Broadway. West Broadway, in its full width, is eighty feet wide. The track on the west side of plaintiffs' buildings is used by the railway company in carrying freight to plaintiffs' buildings. The greater part of the freight is taken from the car directly into the building. There are doors on the west side of the building on Block 9, for receiving freight from the cars, and there are no platforms in front of these doors. The freight is delivered directly from the cars into the building. No other cars, except those carrying freight to plaintiffs' warehouse, were permitted to use or to occupy this track. This track is about four feet, eight inches wide, and the east rail about two feet from plaintiffs' building, leaving just room enough to allow a car to pass freely down the track.

There does not appear to have been any change in the use of North Seventh Street since the vacation of it. There are no buildings on North Seventh Street north from Broadway that open or face on Seventh Street, except the plaintiffs'.

After the passage of this ordinance, the railway company opened Briggs Street, as provided in the ordinance, over their right of way. Sidewalks and plank crossings have been put in.

There is an alley extending north and south, dividing Block 9 through the center, and extending from West Briggs Street to West Broadway.

This is all of the record which we need set out in order to give an understanding of the controversy here and the disposition which is made of it in this court.

Section 751 of the Code provides:

“Cities and towns shall have power to establish, lay out, open, widen, straighten, narrow, vacate, extend, improve and repair streets, highways, avenues, alleys, public grounds, etc.; but no street, avenue, highway, or alley which shall hereafter be dedicated to public use by the proprietor of the ground in any municipal corporation shall be deemed a public street, avenue, highway, or alley, or be under the use or control of such municipality, unless the dedication shall be accepted and confirmed by an ordinance or resolution specially passed for such purpose.”

We think we are justified in assuming, from this record, that North Seventh Street, in controversy, was dedicated to the public use by the proprietors of the ground upon which it rests; that this dedication was duly ac-

1. MUNICIPAL
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cepted by the city. It does not appear, affirmatively, that it was accepted by ordinance, yet it is assumed and practically conceded by the plaintiffs, in their application for this writ that it was a public street, used as such, recognized as such, and conceded to be such, and, whether accepted by ordinance or not, it was a public street under the rule laid down in *Byerly v. City of Anamosa*, 79 Iowa 204, *City of Waterloo v. Union Mill Co.*, 72 Iowa 437, *Shea v. City of Ottumwa*, 67 Iowa 39, and *Snouffer v. Cedar Rapids & Marion Railway Co.*, 118 Iowa 287-297. These plaintiffs and the railway company, in dealing with this street, treated it as a public street, and recognized the authority of the city over it as a public street.

This question needs no further consideration. See also, as bearing upon this question, *Vorhes v. Town of Ackley*, 127 Iowa 658; *Backman v. City of Oskaloosa*, 130 Iowa 600.

Sec. 751, above set out, by its terms

2. MUNICIPAL CORPORATIONS: gives to cities and towns the power to narrow or vacate its public streets. The power in the city to do this has been consistently recognized by this court.

streets: vacation: disposal of vacated streets: review by courts: arbitrary action.

In *Gray v. Iowa Land Co.*, 26 Iowa 387, 389, it was said: "If the city authorities had the power to order the vacation, plaintiff's case is at an end, for the objection made goes, as we understand, to the want of power, and not to the manner of its exercise."

The charter under which the city of Clinton acted in vacating the streets expressly declared that the city council had power to lay off, open, widen, straighten, narrow, vacate or extend, etc., and in that case it was held that the city, under such a charter, had the power to vacate a public street.

In *McLachlan v. Town of Gray*, 105 Iowa 259, an action to enjoin the city from vacating a highway within its limits, it was said: "We understand the General Assembly has plenary power over streets and may vacate or discontinue the public easement in them, and may invest municipal corporations with this authority." It was further said: "It is established in this state, as elsewhere, that under authority from the General Assembly, the municipalities have power to vacate streets." In this case, most of the authorities, preceding the pronouncement therein made, are reviewed.

In *Spitzer v. Runyan*, 113 Iowa 619, the plaintiff sued out a writ of certiorari to test the validity of an ordinance passed by the city of Vinton, whereby certain streets and alleys were vacated, and the land comprised therein granted to the Burlington, Cedar Rapids & Northern Railway Company for depot purposes. This court, in discussing the authority of the city to so do, said: "Sec. 751 . . .

authorizes cities and towns to vacate streets and alleys. It is said by appellants that this power can be exercised only for some public purpose, and that the purpose here is not public. While the power to vacate is not arbitrary and may to some extent be controlled by the courts, the cases are exceptional where such interference is authorized'' (citing authorities). It is therein recognized that the city may vacate public streets or alleys and devote the same to private use.

See *City of Marshalltown v. Forney*, 61 Iowa 578; *Harrington v. Railway Company*, 126 Iowa 388; *Lake City v. Fulkerson*, 122 Iowa 569, and *Walker v. City of Des Moines*, 161 Iowa 215.

Code Sec. 883, in defining the powers of cities and towns, provides:

''They shall have power to dispose of and convey lands unsuitable or insufficient for the purpose for which they were originally acquired, but when such lands are so disposed of, enough thereof shall be reserved for streets to accommodate adjoining property owners. Conveyances executed in accordance with this section shall extinguish all the rights and claims of the city or town existing prior thereto. They shall have power also to dispose of the title or interest of such corporation in any real estate, or any lien thereon, or sheriff's certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, in such manner and upon such terms as the council shall direct.''

As construing and applying this statute, see *Spitzer v. Runyan, Mayor, et al.*, 113 Iowa 619, in which it is said: ''If, then, we must accept as valid the vacation of these streets and alleys, the only question remaining is the right of the city to grant the land they covered to the railroad company. Sec. 883 of the Code settles this matter in defendant's favor.''

As bearing upon this question, see *Lake City v. Fulkerson, supra*; *Harrington v. Railway Company*, 126 Iowa 388.

We have, therefore, statutory and judicial authority for saying that a city or town, through its council, may vacate or narrow a public street, and, having done so, is invested with the authority to dispose of the land covered by the street so vacated, and that, where this power has been exercised by the council in good faith, and for what it believes to be the public good, the courts will not interfere with their action in so doing.

The power of the city to vacate a street, when exercised for the public good, is practically unlimited, and the conclusion of the city council as to what is for the public good ordinarily is conclusive. Some of the cases herein cited perhaps go to the limit in affirming the rights of the city, but such cases are modified, if we may call it so, by what is said in *Walker v. City of Des Moines*, 161 Iowa 215, which expresses the rule to which this court is now committed. This last case, with the others, recognizes the power of the city, under Sec. 751, to vacate its streets and alleys, and to do this in such manner and upon such terms as the council directs. It also recognizes the doctrine that, having effected the vacation, the title to the street continues in the city, and that it may convey the ground vacated to another, to be used for private purposes; that, when vacated, it ceases to be a street, and the right of the public is divested; and that in all essentials, after vacation, it becomes the private property of the city. But it is therein said: "It is well settled that, though the city has the power to vacate its streets and alleys, this power may not be exercised arbitrarily, and in disregard of the trust for the use of the public," citing 2 Elliott on Roads and Streets, Sec. 1182, in which it is said: "Whether it is expedient to discontinue a highway is a question for legislative decision, and when the authority to discontinue is delegated to local officers, and no restrictions are placed upon its exercise, the officers

are invested with a very broad discretion, and unless this discretion has been abused, the courts cannot interfere.”

A question has arisen in many cases in which it was claimed that the city, in the exercise of the power to vacate, had acted arbitrarily, wantonly, or in total disregard of the public right, and it seems to be thought by many courts that, even where this power is conferred on the city, its action may be controlled, annulled or set aside, where it is apparent that the public's interest was not a moving factor in the doing of the act; that is, where the city, under a pretense of exercising its authority under this statute, seeks to destroy the public right in and use of the street, and does this, not for the public good, but for the purpose of enabling private persons to occupy it, or to obtain the exclusive use or control of it, the courts will interfere to prevent such action on the theory that the city is, in so doing, exercising the power granted in violation of the trust imposed. This question is discussed in *Horton v. Williams*, 99 Mich. 423, and in *Smith v. McDowell*, 148 Ill. 51, reported in 22 L. R. A. 393.

Applying this limitation upon the authority of the city council to the case at bar, we find that the street in question was not a street generally used by the public for travel; that, in the judgment of the council, it was necessary that there be a way open over the railway company's right of way through Briggs Street for the accommodation of citizens of the city residing in the east portion thereof; that Briggs Street, when properly opened and devoted to the purposes of travel, afforded a convenient and accessible way for the people of the city (numbering something like eight hundred) to reach the business portion.

In consideration of the vacation of the west half of North Seventh Street between the points indicated, and the conveyance of this strip so vacated to the company, the Chicago, Rock Island & Pacific Railway Company granted to the city a strip or tract sixty-six feet wide over and across its depot grounds, as an extension of and opening up of West Briggs

Street, and agreed to maintain the crossing so made reasonably safe and adequate for vehicles and pedestrians, and that this should include the construction of approaches, plank crossings, and cement walks, in accordance with the ordinance of the city.

We find no evidence of an arbitrary or unjust exercise of the power granted to the city. It acquired what it considered of greater value to the city and the public than was that which it surrendered.

The state has, and has always assumed, control over all the public highways within its borders. Through its legislature, it has authority to and has delegated to cities the con-

3. MUNICIPAL CORPORATIONS: streets: vacation: constitutionality of statute: special laws. . . . control of public highways, streets, and alleys within the limits of the city. All municipal corporations are the creatures of the state, and come into existence and derive their rights and powers through the general laws

of the state. The state, through its legislature, has delegated to municipalities so created, certain powers. In this way, it seeks to and does exercise its original powers through the instrumentality of these municipalities. When we assume that the state has power over all public highways,—power to control and regulate the same,—and, through its legislative bodies, has power to create municipalities and to bestow upon them, when created, powers of local self-government, we are very near to the conclusion that the legislature has a right to delegate to these municipalities control over the public highways within their limits. This certainly is not class legislation. The powers are general, and are granted to all municipalities created by the legislature in the same way and to the same extent, when they are of like character, and the granting of this power is not in violation of Article 3, Sec. 30, of the Constitution of this state.

It is insisted that the state, through its legislative authority, cannot take private property for public use without *first*

making compensation; that such act would be in contravention of the provisions of Article 1, Sec. 18,

4. MUNICIPAL
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of the Constitution, which reads: "Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof," etc.; and it is contended that, as this power does not lie in the legislature, it cannot delegate to the city authority to do that which it could not do itself; that Sec. 751 of the Code, heretofore referred to, authorizing the vacation and narrowing of streets, makes no provision for the payment of any damages which may be suffered by a private citizen by reason thereof, and is, therefore, void as in contravention of the constitutional provision.

It is further argued that this ordinance is void because it made no provision for compensation to abutting property owners.

No part of the plaintiffs' property was taken by the vacation of this street. The most that can be contended is that plaintiffs' property was *damaged* by the action of the city in vacating the street. Conceding, for the sake of argument, (the question is not directly involved here) that the plaintiffs did suffer some damage by the exercise of the power granted to the city council, yet the constitutional provision above referred to, and the inhibition therein do not cover the question of damages to property. In many of the states it does. In many of the states, the Constitution provides for the payment of damages, and in some states it is held that the word "taken" includes damages that are the proximate result of such act, even where the Constitution does not so provide. But in none of the states where the Constitution is silent as to damages has it been required that compensation first be made before the damages are inflicted. The damages in such case are only consequential, and cannot be ascertained or determined with any degree of accuracy before the completion of the act out of which the damage arises; and in those

states where it is held that damages are recoverable, the party suffering the damages is left to his legal remedy to recover. See *Ridgway v. City of Osceola*, 139 Iowa 590. This was an action to recover damages occasioned to the plaintiff by the vacation of a public street and alley. In this case, the right to recover was recognized when it was shown that the damages suffered by the abutting landowner were different from those of the general public, but it was there held: "If the owner still has free access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with, no damages may be recovered."

There is a difference between the vacation of a public street and damages incident thereto, and the taking of private property for use as a public street. In the taking of private property for a street, the injury is direct, immediate, and ascertainable at once and the constitutional provision applies, and compensation must be first made; but in the vacation of a street, the damages are not direct, immediate, or at once ascertainable. In fact, the vacation of a street may be a direct benefit to abutting property owners. The damages in such case are merely consequential, and though recoverable in an action against the city, it is not necessary that they be first ascertained and paid.

As supporting this proposition, see *Vanderburgh v. City of Minneapolis*, (Minn.) 108 N. W. 480. In that case it was said: "Originally our Constitution . . . provided that private property should not be taken for public use without compensation *first* being paid or secured to the owner. It was subsequently amended, and now provides that private property shall not be taken or 'damaged' without compensation." That case was an action against the city to recover damages for vacating a public street, and the contention of the plaintiff was that the ordinance vacating the street was invalid because no provision was made for compensating abutting owners at the time the council adopted the resolution vacating the street. The court said: "If we were to

follow the general rule on the subject, and hold that because plaintiff's damages were not previously ascertained and paid, the action of the council in vacating the street 'was void, it might cause much litigation and confusion in the cities and other municipalities of the state. No doubt many streets and alleys have heretofore been vacated under circumstances precisely like those shown in this case, no compensation by way of damages having been ascertained or paid. . . . The damages for injuries of this nature, where no property is actually taken, are consequential, not direct. No person is actually deprived or dispossessed of his property, and the authorities hold that prepayment is unnecessary. The damages in such case may be recovered against the municipality. That remedy is adequate and sufficiently protects all constitutional rights."

See *Clemens v. Connecticut Mutual Life Insurance Co.*, (Mo.) 82 S. W. 1; *Wetherill v. Pennsylvania Ry. Co.*, (Pa.) 45 Atl. 658; *Morris v. City of Philadelphia*, (Pa.) 49 Atl. 70; *McGee's Appeal*, (Pa.) 8 Atl. 237; *Parker v. Catholic Bishop of Chicago*, (Ill.) 34 N. E. 473. This last named case was an action involving the vacation of a street. It appears that the street had been vacated by the action of the city council. It was thought by the plaintiff that such action was void because, although no part of the complainant's property was taken, yet by the provisions of the Constitution of the state, similar to ours, the vacation was void, for the reason that, before such vacation would be valid, the city council was required to first ascertain and pay the complainant damages. In that case it was held that such contention was not sound. It was further said: "While private property cannot be taken by public authority for private use, it may be taken or damaged for a public use upon payment of just compensation. . . . It seems to be well settled . . . that where no part of the land or property of the complaining owner is physically taken for or in making the proposed public improvement and the damages claimed to result are therefore consequential only,

this provision of the Constitution does not require the ascertainment and payment of such damages, as a condition precedent to the exercise of the right or power"—citing *Stetson v. Railroad Co.*, 75 Ill. 74, 76; *Insurance Co. v. Heiss*, 141 Ill. 35. The case further says: "It seems to be sufficient to answer the constitutional requirement that a remedy is provided for the recovery of such damages." The court, referring to the *Stetson Case*, *supra*, said: "It was there held, and it has been repeatedly since followed, that the damages there referred to were direct and physical, resulting from a taking of a portion of the land, and that where no portion of the land was taken, the damages suffered are consequential, and that condemnation proceedings were not required to be instituted to ascertain the same."

The rights of the plaintiffs, if any they have, against the Rock Island Railway Company to have the west side of North Seventh Street kept open for public use, are not involved in this suit, and we do not make any pronouncement upon that question.

There are other questions argued in the submission of this cause, but they are not relevant to the matter here submitted for our determination. We find no error in the action of the court and the cause is therefore—*Affirmed*.

DEEMER, C. J., LADD, WEAVER, EVANS, PRESTON, JJ., concur; SALINGER, J., specially concurs.

SALINGER, J. (concurring specially). I concur in affirmance, but I do so upon the single ground that the city has full power to order the vacation of a street or alley, and to transfer the ground after the vacation has been completed. It follows that certiorari will not lie, for that reviews only an exceeding of power or other illegal action. I am not inclined to follow the case of *California P. R. Co. v. Central Pacific Railroad Co.*, 47 Cal. 528, which sustains certiorari because vacation had been ordered without pre-ascertainment and prepayment of damages. But I think the decision has no occa-

sion to determine whether our constitutional provision regarding pre-ascertainment and prepayment of damages applies here. I dissent from so much of the opinion as does this for reasons fully stated in the dissent in *Hubbell v. City of Des Moines*, decided at this present term.

S. J. McCORD, Appellant, v. PAGE COUNTY, IOWA, Appellee.

SHERIFFS AND CONSTABLES: Salary—"Receipts of Office"—Construction of Statute. A statute should be construed in the light of subsequent and existing companion statutes on the same subject-matter. Therefore, it is held that the fees to the sheriff for summoning juries, as provided by Sec. 511, Code, 1897, though "to be paid out of the county treasury," constitute "receipts of the office" within the meaning of Sec. 511-a, Sup. Code, 1913, subsequently enacted, which provides for a minimum salary to be paid out of the "receipts of the office." Therefore, such fees should be charged to the sheriff in adjusting his salary.

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

THURSDAY, APRIL 8, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION to recover an alleged balance due the plaintiff on his salary as a former sheriff of the defendant county. A demurrer to the petition was sustained. The plaintiff elected to stand thereon and his petition was dismissed. He appeals. —*Affirmed.*

Earl R. Ferguson, C. R. Barnes, and T. F. Willis, for appellant.

Levi H. Mattox, for appellee.

EVANS, J.—The plaintiff was the sheriff of Page county from January 1, 1904, to January 1, 1911. He claims a bal-

ance due on his statutory salary for each of the years of his incumbency. The dispute between the parties arises over a construction of the statute.

SHERIFFS AND
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It is conceded that the plaintiff was entitled to a minimum compensation of \$1,800 per year; that this amount was to be made up primarily from the receipts of the office; that, if the receipts of the office for any year were less than \$1,800, the county was required to pay the difference. The plaintiff received fees for summoning jurors. The amounts thus received ranged from \$100 to \$150 per year. The board of supervisors of the defendant county treated these amounts as a part of the "receipts of the office." Upon such basis, they allowed the sum necessary to make the compensation \$1,800. It is the contention of the plaintiff that the amounts received by him should not be deemed as a part of the receipts of the office within the meaning of the statute and that the computation adopted by the defendant county deprived him of his salary to that extent. The controlling question in the case, therefore, is: Are the fees received by the sheriff for summoning jurors a part of the "receipts of the office" within the meaning of the statute? This question involves a construction of Sec. 510-a and Sec. 511, Code Supplement, 1902. So far as is material to this inquiry, these sections are as follows:

"Sec. 510-a. In counties having a population of over 11,000 and less than 28,000 the sheriff shall receive in full compensation for his services, including the salary provided by Sec. 511 of the Code, the sum of two thousand (\$2,000) dollars per annum, the same to be paid out of the receipts of the office. And any excess over the sums provided in all counties shall be paid into the county treasury annually. In all counties, the expenses necessarily incurred and actually paid while engaged in the performance of official duties in serving criminal processes, or commitments to the penitentiaries, industrial schools or asylums, shall be allowed by the board of

supervisors and paid as other claims against the county, and he shall be allowed to retain all mileage collected by him in the service of civil process. Provided, . . . that in counties having a less population than 28,000, in which the receipts of the office and salary allowed under Sec. 511 of the Code do not amount to the sum of \$1,800 per annum, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office in the previous year, and \$1,800. . . . And provided further, that all fees earned and uncollected at the end of each year shall belong to the county, and when paid shall by the clerk of the district court be reported to the board of supervisors and paid into the county treasury.”

“Sec. 511. Each sheriff is entitled to charge and receive the following fees: . . .

“3. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant, as sworn to by the sheriff; if service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable;

“4. For serving and returning a subpoena, for each person served, twenty cents;

“5. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service;

“6. For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending them, five dollars per day. . . .

“12. Mileage in all cases required by law, going and returning, five cents per mile; . . .

“23. The sheriff is also entitled, for attending the district court, and for other services for which no compensation is allowed by law, except in counties having a population of over 28,000, an annual salary, which shall be fixed by the board of supervisors, but in no case less than \$200 nor more than \$400. When sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables.”

It will be noted that we have set forth some portions of Sec. 511 which are not directly applicable to this case. We have set them forth for the purpose of differentiation only.

We have held that provisions for mileage and expenses are additional to this salary and as such are not to be deemed as “receipts of the office.” *Bybee v. Marion County*, 128 Iowa 610.

We have also held that the salary fixed by the board of supervisors, under the provisions of Subsec. 23 of Sec. 511, is to be included as receipts of the office and is not, therefore, in addition to the larger salary provided for by Sec. 510-a. *Dallas County v. Hanes*, 135 Iowa 550.

It will be noted that Subsec. 5 of Sec. 511 allows to the sheriff sixty cents for each juror served with summons and provides that this shall be full compensation for such service. The argument for the plaintiff is that this fee is intended to cover *expenses* and nothing more. Such is not the language of the statute. It is argued that the amount allowed is so meager that it could not have been intended for anything but expenses. This provision of the statute was enacted many years prior to Sec. 510-a. The service, therefore, was required of the sheriff long before there was any provision for a minimum salary. This proviso was enacted by the Nineteenth General Assembly. Prior to that time, Sec. 3788, Code of 1873, provided as follows: “Summoning a grand or trial jury, for each panel, including mileage, to be paid out of the county treasury, \$8.00.”

Whether provision ought to have been made for expenses is not the question before us. There is some expense attendant upon all performance of official duties. Some of these expenses are provided for by statute. Others are not. What is plain to us is that there is no provision for expenses as such for service of summons upon jurors. The legislature doubtless took notice of the well-known fact that the expense usually incurred in the service of summons upon jurors is nominal only. The service is usually and efficiently done by mail and telephone. The time and service of the officer belongs to the office. Under the former law, it was intended to be compensated by the flat fee. Such compensation, both under the Code of 1873 and under Sec. 511 of the present Code, was undoubtedly a part of the "receipts of the office" prior to the enactment of Sec. 510-a by the Twenty-Ninth General Assembly. It became no less a part of the "receipts of the office" after the enactment of Sec. 510-a.

It is further argued that the sixty-cent fee was not deemed a part of the "receipts of the office" because of the provision in the statute that it is "to be paid out of the county treasury." It is urged that the use of this language indicates the intention of the legislature to eliminate the item from the receipts of the office as such for the purpose of adjusting the minimum salary. As already indicated, however, this statute was formulated and enforced for twenty years before the enactment of Sec. 510-a, and before there was any provision for a minimum salary. The purpose of this provision was to make the county liable to the sheriff to this extent for this service. Without such provision, the county would not have been liable and the sheriff could have received nothing for his service. In this respect an analogous situation is presented in Subsec. 23 of Sec. 511 above quoted. By such provision, the board of supervisors was required to make a moderate allowance to the sheriff for services not otherwise provided for. This provision also was enacted long prior to Sec. 510-a. As heretofore indicated, any sum

thus allowed by the board of supervisors is counted as a part of the receipts of the office for the purpose of adjusting the minimum salary. *Dallas County v. Hanes, supra.*

It is argued also that the effect of the ruling below would be to require the sheriff to count as a part of the "receipts of his office" the amounts received for boarding prisoners. If this were so, it would not be an argument for the different construction. The real plausibility of the argument rests upon the distinction in the two provisions. Under the statute, the amount to be allowed for the boarding of prisoners is to be fixed by the board of supervisors, subject to the limitation of a very moderate maximum. Presumably the board of supervisors would take account of the fair cost of such a performance and fix the rate accordingly; but the statute does not contemplate that the feeding of prisoners should be a source of profit to the public officer as distinguished from the fair cost of food and service.

We think that the statute clearly contemplates the fees in question as a part of the "receipts of the office." The demurrer, therefore, was properly sustained. Our conclusion at this point is decisive of the case and we need not consider the question of the statute of limitations.

The judgment below is accordingly—*Affirmed.*

DEEMER, C. J., LADD and PRESTON, JJ., concur.

D. S. PLEAK, Appellee, v. MARKS & SHIELDS, Appellants.

VENUE: Pottawattamie County—Avoca and Council Bluffs District
1 —Office or Agency. An action may properly be brought in the Avoca district of Pottawattamie county against a resident of Council Bluffs in said county, when the action grew out of or was connected with an agency maintained by defendant at Avoca, irrespective of the question whether such two districts are the equivalent of two counties. (Sec. 3500, Code.)

ATTACHMENT: Pottawattamie County—Place of Levy—Removal
2 of Property from "County." The sheriff of Pottawattamie

county may legally serve a writ of attachment in any part of said county, whether the action is commenced at Avoca or Council Bluffs. Service held proper for the additional reason that the property was removed from the Avoca district to the Council Bluffs district after the sheriff received the writ and was pursued and seized by the sheriff "within 24 hours" thereafter. (Sec. 3893, Code.)

VERDICT: Directed Verdict—When Inevitable. When the record
3 shows without dispute (a) the price defendant agreed to pay for the property, (b) delivery, (c) an attempted rescission by defendant and an abandonment of the attempt, and (d) the withdrawal by defendant of all his counterclaims, a directed verdict is inevitable.

Appeal from Pottawattamie District Court at Avoca.—HON. J. B. ROCKAFELLOW, Judge.

SATURDAY, APRIL 10, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION at law, aided by an attachment, to recover the agreed price of certain personal property sold by plaintiff to the defendants. Motions for change of venue and for discharge of the attached property were filed and overruled. An answer including a counterclaim was filed. At the close of the evidence, the counterclaim was withdrawn without prejudice. The trial court thereupon directed a verdict for the plaintiff. The defendants appeal.—*Affirmed.*

George B. Clark and Preston & Dillinger, for appellee.

F. A. Turner and Mayne & Green, for appellants.

EVANS, J.—The defendants, Marks & Shields, constituted a partnership. The members of the partnership resided in Council Bluffs. The partnership was engaged in the business of buying and selling horses and mules. On Saturday, January 4, 1913, Marks bought from the plaintiff for the partnership a span of horses and a span of mules for a lump sum of \$662.50, and delivered the check of the partnership

therefor. These animals were left in the possession of the plaintiff, who was to deliver them within a day or two at the livery barn of N. S. Gray at Oakland. They were thus delivered on the following day and were received for the partnership by N. S. Gray. Within an hour after their delivery, one of the mules was choked to death by his halter. The loss of this animal created the controversy, further details of which will be later set forth in the discussion of the questions presented for our consideration.

I. Appellants complain of the ruling denying the application for a change of venue. This action was begun in the district court of Pottawattamie county at Avoca. The mem-

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| 1. VENUE: Pottawattamie county: Avoca and Council Bluffs district: office or agency. | bers of the partnership resided at Council Bluffs in the same county. This county has two county seats, Council Bluffs and Avoca. The district court of the county is held at each county seat. The same court officials |
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officiate at each county seat with the aid of a local deputy clerk and deputy sheriff. This situation was created by Ch. 198 of the Acts of the Twentieth General Assembly. Sec 3 of such act was as follows:

“That from and after the first day of January, A. D. 1886, the said circuit court to be held at Avoca shall have original and exclusive jurisdiction as now provided by Sec. 162 of the Code of Iowa of 1873, or as may be hereafter provided by law regulating the jurisdiction of said court of all civil cases including appeals and writs of error from inferior courts and other tribunals and guardianship and probate matters arising in the territory in said Pottawattamie county east of the west line of range forty.”

The dividing line separating the venues of the two branches is the west line of range forty. The property in question was purchased in the Avoca division. The town of Oakland, where the delivery was made, is in the division of Avoca. Because the members of the partnership resided at

Council Bluffs, it is contended that the action should have been brought in the Council Bluffs division. The argument is that the two divisions are the equivalent of two counties and that the bringing of the action in the Avoca division was equivalent to bringing it in the wrong county. Except as above set forth, the statute creating the Avoca division is silent on such question. Under the general statutes, it is true that the actual residents of Council Bluffs would not be required to defend personal actions against them in any other county than Pottawattamie. This action was brought against them in Pottawattamie county, so that the literal requirements of the statute in that respect were complied with. What remedy is open to a defendant resident of Council Bluffs if an action be wrongfully commenced in the Avoca district is not clear. Upon the record before us, we do not find it necessary to pass upon it. The transaction out of which this suit arose occurred wholly in the Avoca district. Granting, for the sake of the argument, that this fact would not of itself fix the venue of the action in the Avoca district, it was made to appear that the defendant partnership was engaged in the business of buying horses in the Avoca district and that they used the livery stable of N. S. Gray as a place and agency for the transaction of such business, in that all the horses purchased in that vicinity were to be there delivered, and that N. S. Gray acted as agent in receiving such delivery. In pursuance of the contract of purchase, the plaintiff delivered his animals at such place and to Gray, who received them on behalf of Marks & Shields. The agency of Gray was doubtless a very limited one, but it was an agency, within the meaning of Code Sec. 3500. Such section is as follows:

“When a corporation, company or individual has an office or agency in any county for the transaction of business, any actions growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located.”

If, therefore, these two divisions should be deemed the equivalent of two counties, these facts justified the bringing of the action in the Avoca district, under the terms of the foregoing statute. There was no error, therefore, in denying the application for a change.

II. Defendants moved for a discharge of the attached property on the ground that the attachment was served in the Council Bluffs district and not in the Avoca district.

2. ATTACHMENT:
Pottawattamie
county: place
of levy: re-
moval of prop-
erty from
"county."

In consideration of this motion, the facts appearing were that the writ of attachment was sued out on Tuesday morning and placed in the hands of the sheriff between 9:30 and 10:00 A. M. On the same morning, the defendants started the attached property from Oakland in the Avoca district to Council Bluffs. They were overtaken at about 4:00 P. M. at the town of Treynor, which is on the Council Bluffs side of the line, and the writ was then and there executed. The argument is again that the officer who had authority to serve a writ of attachment in the Avoca district could have no authority to serve it in the Council Bluffs district. If we were dealing with two counties, a writ of attachment directed to the sheriff of one county could not ordinarily be served by such officer outside the boundaries of the county. The writ issued in this case is not contained in the record. Presumably it was directed to the sheriff of Pottawattamie county. Such would be the requirement of the statute. Pottawattamie county has but one sheriff, though he may act through deputies. In such cases, the official act of the deputy is necessarily the official act of the sheriff. The clerk could have issued writs to different counties. But we can conceive of no reason why he should issue more than one writ to the sheriff of Pottawattamie county. If the sheriff of Pottawattamie county could not serve the writ in the Council Bluffs district, who could?

There is a further reason quite controlling in this case. The evidence was sufficient to justify the court in finding

that the attached property was within the Avoca district when the writ of attachment came into the hands of the officer. Under Code Sec. 3893, such official was authorized to "pursue and attach the same in an adjoining county within twenty-four hours after removal." There was no error, therefore, in denying the motion to discharge the attachment.

III. The answer of the defendants was a general denial and a plea of a rescission of the contract of purchase. A counterclaim also was filed. One count thereof claimed dam-

ages for wrongful issue of the attachment.
 3. VERDICT: directed verdict: The other count claimed damages for alleged
 when inevitable. negligence of the plaintiff, which resulted in

the loss of the animal in question. At the close of the evidence, the entire counterclaim was withdrawn, and we may ignore the testimony given in support thereof. We have only to do, therefore, with the question of whether, upon the record, the defendants were entitled to go to the jury. There was no dispute as to the amount of the purchase price or as to the fact of delivery. There was a claim by the defendants that the delivery should not have been made before Monday, the 6th. But this was material only as bearing upon the counterclaim. After the loss of the animal, the defendants declared a rescission of the contract upon the ground that the loss was occasioned through the fault of the plaintiff and through breach of his contract for delivery. They sent the other three animals forthwith to the farm of the plaintiff, who refused to receive them. The defendants therefore took them back to the livery stable and, on the following day, started them for the market at Omaha. The defendants pleaded as a defense the rescission of the contract and return of the living animals. No material fact is in dispute even at this point. It is argued for plaintiff that the contract was indivisible and that, because defendants disposed of the carcass of the dead animal, they therefore could not rescind by returning the three living animals. Our impressions are not favorable to this line of argument. If the defendants were entitled to rescind, it would

be on the theory that the death of the animal resulted through the fault of the plaintiff in the delivery. We can hardly think that the defendants were required to carry this putrefying carcass to the plaintiff in order to save their legal rights. The public would have some rights at this point. If the carcass had any money value, the defendants would doubtless owe a commensurate duty to protect the plaintiff to the extent of such value. It is doubtful, also, whether the defendants were under the necessity of returning the property to the farm of the plaintiff as a condition of rescission. The livery stable was agreed upon at the time of the purchase as the place of delivery and the property was actually delivered there. So far, therefore, as the declaration of rescission and the return of the property thereunder are concerned, we are disposed to think that they would have been sufficient, provided, of course, that it be found that the defendants were legally entitled to rescind; and provided further that they had stood upon their rescission.

But the defendants did not stand upon their rescission. Upon the refusal of the plaintiff to receive the property, the defendants proceeded to put the same upon the market. They were sold in due course upon the Omaha market. The defendants did not in their answer keep their tender good. Their answer contained no tender whatever. We will assume that they were not bound under all circumstances to keep the property for the purpose of keeping their tender good. The circumstances might warrant their disposal of it. Even then they would be required to dispose of it for the benefit of the plaintiff, if they proposed to keep their tender good. The answer in this case pleaded only the rescission and the offer to return. It contained no suggestion of present tender either of the property or of its proceeds. The defendants, therefore, are in the position of having abandoned their tender of return and of having fully appropriated the property to their own use. Apart from the counterclaims and the general denial, the answer presented no defense. The general denial

was fully overcome by the conceded facts. The counterclaim was withdrawn. There was nothing left for the jury and the trial court properly directed a verdict. Its order is, therefore,—*Affirmed*.

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

POLK COUNTY, Appellant, v. CLARKE COUNTY, Appellee.

PAUPERS: Legal Settlement of Insane Wife—Removal of Husband—Effect. The legal settlement of a wife not abandoned by her husband follows that of her husband. (Sec. 2224, Code.) The reason is that the husband has the right and authority to control the abiding place of his wife, in order to meet his duty as head, provider and support of the family. The law ends, however, where the reason ends. The legal settlement of an insane wife, committed to the Hospital for the Insane from the county of her residence and legal settlement, remains unchanged by any act on the husband's part so long as such public restraint continues.

PRINCIPLE APPLIED: A husband and wife had their residence and legal settlement in Polk county. The wife became insane and was duly committed to the State Hospital for Insane, where she remained six years, and was then returned to the authorities of Polk county as incurable. She was then committed to the Polk County Hospital for Insane. Three years after she was returned as incurable, her husband removed from Polk county to Clarke county, and thereafter maintained his residence in Clarke county, though he did not abandon his wife. Twenty-six years later, Polk county brought suit against Clarke county, under the statute governing support of paupers, on the theory that the legal settlement of the insane wife followed her husband into Clarke county. *Held*, the legal settlement of the wife remained in Polk county.

Appeal from Clarke District Court.—HON. THOS. L. MAXWELL, Judge.

TUESDAY, MARCH 16, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION at law to recover for moneys expended by the plaintiff in the care and support of an insane person alleged

to have had a legal residence in the defendant county. The court having sustained a demurrer to the petition, the plaintiff appeals.—*Affirmed.*

A. D. Pugh, for appellant.

Henry Stevens, County Attorney, and *O. M. Slaymaker*, for appellee.

WEAVER, J.—Stated as briefly as practicable, the case made by the petition is as follows: On October 18, 1878, one Frances E. Thompson, wife of J. B. Thompson, both of whom then had their residence and legal settlement in Polk county, was adjudged insane, and as such was duly committed to the State Hospital for the Insane at Mt. Pleasant, where she remained until April 19, 1884, when she was remanded, as incurable or unimproved, to the custody of the proper officers of Polk county, and was by them committed to the hospital provided for the insane in that county where she has ever since remained, being at all times there kept, cared for and maintained at said county's expense. On or about August 1, 1887, J. B. Thompson, husband of the insane person, removed from Polk county to Osceola, in Clarke county, where he acquired and has ever since maintained a legal settlement. During all the time since Frances E. Thompson was adjudged insane, the said J. B. Thompson has been her lawful husband and he has never abandoned her. On September 27, 1913, the commissioners of insanity of Polk county undertook a legal inquiry into the question of the legal settlement of Frances E. Thompson and made a finding that her settlement then was, and since August 1, 1887, had been, in Clarke county. On the same day, September 27, 1913, the clerk of the district court of Polk county sent written notice to the auditor of Clarke county of the above mentioned findings of the commissioners of insanity. To this notice, the auditor of Clarke county responded, denying the correctness of said

PAUPERS:
legal settle-
ment of insane
wife: removal
of husband:
effect.

finding and stating that after due investigation he had found that Frances E. Thompson had not then and had never had legal settlement in Clarke county, and that Clarke county was in no manner liable for the expenses which had been or might be incurred for her care or maintenance. The plaintiff further alleges that the actual, reasonable and necessary expense of the care and support given by it to the said Frances E. Thompson has been \$32.50 per quarter, or \$130 per year; that it has presented its claim and demand therefor to the amount of \$3,400.21 to the board of supervisors of Clarke county and that such claim has by said board been disallowed and rejected. Upon the foregoing statement of facts, judgment is asked against defendant for the amount of plaintiff's claim with interest and costs. The defendant demurred to the petition upon various grounds, of which we need here notice only the following: The petition shows that Frances E. Thompson never acquired a legal settlement in Clarke county. The trial court sustained the demurrer generally, and plaintiff declining to amend and electing to stand upon its petition as filed, the court dismissed the action and entered judgment against plaintiff for costs.

The main question raised by the demurrer and the one to which we direct our attention is whether the facts as stated and admitted show the legal settlement of the insane woman to be in Clarke county. The statute relating to the relief of the poor provides (Code Sec. 2224) that for the purposes of that act the legal settlement of a wife who has not been abandoned is that of her husband. That rule has also been applied by this court in certain cases arising under the statute for the care of the insane. *Scott County v. Polk County*, 61 Iowa 616; *Washington County v. Polk County*, 137 Iowa 333.

Neither of the cited cases, however, is in principle parallel with the one presented by this record, and so far as our precedents are concerned, the question before us is one of first impression. The theory of the statute, Code Sec. 2224, making the settlement of the wife that of the husband, has

its origin in the general and accepted theory of the family relation. Ordinarily speaking, a family consists of husband, wife and dependent children, if any, and the husband is its head. On him rests the duty of providing the home and the support of the household, and with him rests the authority to select the place of residence. When, for business or other reasons, he removes from one county to another, wife and children go with him,—the unity of the family remains unbroken. Wherever he establishes a home, there he is entitled to, and ordinarily has, the society, comfort, and service of those who, with him, constitute the family circle. The statutory recognition of this fact operates as a protection both to the county from which he removes and the one to which he goes. He cannot shift his responsibility by crossing the boundary line of his county; and wherever he settles, the local authorities have jurisdiction to compel his observance of the duties which the law has imposed upon him. There is, then, a large measure of justice and reason in the establishment of a rule by which, so long as the legal unity of the family remains unbroken and the reciprocal obligations of support and service are unimpaired, the law looks alone to the settlement of the family head as determinative of the settlement of those who belong to his household. But is this rule to be carried to the extent of saying that, where the wife is adjudged insane in the county of her admitted settlement and is taken into the custody of the law under a commitment by which she is deprived of her liberty indefinitely or for life, the subsequent removal of the husband alone to another county and the acquirement by him of a settlement there works a change in the legal settlement of the wife and renders the latter county chargeable with the cost of her support in the hospital where she is confined? We are of the opinion that the statute is not fairly open to that construction. In the first place, as we have already noted, Code Sec. 2224, which defines the legal settlement of a wife, is found in the chapter relating to the care for the poor. If, by analogy,

we apply the same rule to the care of an insane wife—and we have so applied it—the analogy has its limitations and should not be carried beyond those cases where the reasons underlying the rule are alike in both. To some extent the statutes for the care of the poor and of the insane have the same charitable purpose of relieving human suffering and promoting the general welfare of society; yet the provision for the forcible restraint and isolation of the insane has the further important purpose of safeguarding not only the life of the patient but also the lives of those brought in contact with persons thus sadly afflicted. Ordinarily, the extension of poor relief is not made at the cost of disrupting the family thus aided. On the other hand, care of the insane by the state or county authorities by restraint in institutions provided for that purpose necessitates such disruption. The insane wife, while in name still a member of the husband's family, is no longer a member of his dependent family. She is the ward of the state. The husband has no control over her and is powerless to direct the manner or place of her restraint. She has neither intelligent volition nor liberty of action. She cannot follow the husband to his new place of residence. The duty which would rest upon her as a sane wife not under restraint, to go where he goes and abide where he abides,—the duty which lies at the foundation of the rule making his settlement her settlement,—is wholly lacking; and in the absence of an express statutory provision that the settlement of a wife duly found insane in the proper county and thereafter restrained in the hospitals or asylums provided for that purpose shall follow the settlement of the husband as he may wander from county to county, we do not feel authorized to affirm such a rule or to establish such a precedent. In short, we hold that the legal settlement of an insane wife committed to the insane hospital from the proper county remains unchanged by any act on the husband's part, so long as the restraint of the wife under such commitment continues. Had the wife been discharged or permitted to

return to her family—even though uncured—and a new settlement acquired under such circumstances, a very different question would arise, should it thereafter be necessary to renew the restraint.

It is proper to note in conclusion that the adoption of the theory urged by counsel for plaintiff would be so prolific of hardship and injustice to counties to which the worse than widowed husband in such case might wander that the court would unhesitatingly reject it unless it be found justified by some clear expression of legislative authority. The county to which the husband goes would be practically helpless to protect itself against liability. It cannot be presumed to inquire into or know the family history of every person proposing to make a home within its borders, and if, as in the case at bar, such bills may accumulate for more than twenty-six years without notice, express or implied, and then the collection thereof be enforced, it might well become a source of embarrassment to many counties. Indeed, if *argumentum ad hominem* is a proper consideration in disposing of a question of law, Polk county, having within its jurisdiction the state's largest city, to which much of the human wreck and driftwood of the state at large naturally centers, might easily find a favorable decision of this controversy furnishing a precedent upon the question of the legal settlement of insane wives and family dependents, of which it would gladly be relieved in the future.

Having reached the conclusion indicated upon the most vital issue raised by the demurrer, and it being decisive of the case, we do not undertake to pass upon the effect of the statute of limitations, or the necessity or sufficiency of notice to the defendant county, to which counsel have directed a portion of their arguments. For the reasons stated, the ruling and judgment of the district court are—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

SAMUEL SIMONS, Appellant, v. ISAAC PETERSBERGER et al,
Appellees.

EVIDENCE: Best and Secondary—Due Diligence to Produce Best

- 1 **Evidence.** "The best evidence attainable," while a dominant law of evidence, requires no more than due diligence. After exhausting due diligence to produce the primary, a litigant has a right to use the secondary evidence.

PRINCIPLE APPLIED: Plaintiff brought action against defendant for damages in writing false and defamatory letters to a client in a foreign state with intent to injure plaintiff's credit. Plaintiff asked for an order for defendant to produce the original letters. Defendant objected, but did not deny possession. Being ordered to produce, he filed three copies. Plaintiff served defendant with notice to produce the originals. Defendant failed to do so. Plaintiff took the deposition of the secretary of the addressee in a foreign state and called for the letters, but was met with evasions and a final refusal. Plaintiff moved for a continuance in order to get the evidence. This was overruled. At trial, defendant was called and denied having the letters. *Held*, the copies were admissible.

WITNESSES: Confidential Communications—Letters of Attorney—

- 2 **Client Not Party Defendant.** Letters written by defendant, an attorney, to his client, not a party to the action, alleged to be maliciously false and defamatory of plaintiff's credit and business, are not privileged. They cannot be excluded because the client, not a party to the action, has not given his consent.

TENDER: Coupling with Condition—Invalidity. A tender, coupled

- 3 with a condition that it be received "in full settlement," is not a legal tender.

WITNESSES: Privileged Communications—Malice—Effect. The

- 4 element of "malice" will destroy the privileged character which ordinarily attaches to communications between attorney and client. So held in an action by plaintiff against an attorney for writing false and defamatory matters to his client of and concerning plaintiff.

PLEADING: Qualifying Denial by "If." It is not allowable to

- 5 qualify the denial or affirmation of an issuable fact by an "if."

PRINCIPLE APPLIED: Plaintiff brought action against defendant, an attorney, for writing false and defamatory matters of and concerning plaintiff. Defendant pleaded "that all communications, if any, that he sent to his said client concerning the plaintiff were true and made by him in the regular course of his duty, etc." *Held* not to constitute an answer and to raise no issue.

Appeal from Scott District Court.—HON. WM. THEOPHILUS, Judge.

WEDNESDAY, MARCH 10, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

THE opinion sufficiently states the case.—*Reversed*.

Sharon & Higgins, for appellant.

Lane & Waterman and *Isaac Petersberger*, for appellees.

WEAVER, J.—Though the Jewelers Board of Trade is named as a defendant in the petition, and counsel for plaintiff appear to argue the case on the theory that the party so named is in court, the record seems to show no service upon it and no appearance in its behalf, and we shall consider the case only as it relates to the issues between the plaintiff and the other two named defendants.

The plaintiff is a retail jeweler in the city of Davenport. The petition is somewhat obscurely stated, but the theory of the case presented by plaintiff seems to be that the defendant Petersberger, an attorney at law in Davenport, falsely and maliciously reported to the Jewelers Board of Trade that plaintiff was in financial straits and that this false and misleading statement was by the Board of Trade sent out to the wholesale dealers in that line of business, thereby injuriously affecting plaintiff's credit and standing as a business man, and that, in the further pursuance of said wrongful purpose to injure plaintiff and to obtain his outstanding bills for collection, Petersberger and the Credit Adjustment Com-

pany, a corporation organized and controlled by him, falsely led plaintiff to believe that they held or controlled practically all his outstanding indebtedness and, by threatening to force him into bankruptcy, induced him to execute an instrument surrendering all his property to the Credit Adjustment Company, and to further pay to said company the sum of \$30 in money. It is further alleged that, it being discovered that the said defendants did not have or control the claims of plaintiff's creditors against him, they did not take possession of the property or assert any right therein, but did not and have not yet returned to plaintiff the said sum of \$30 received from him. Upon the grounds thus stated, judgment against defendants for damages is demanded.

The Credit Adjustment Company made answer to the petition, denying its allegations and pleading payment of the item of \$30. Petersberger, answering for himself, admitted his relation as attorney for the Jewelers Board of Trade, but denied all other allegations of the petition.

Trial was had to a jury and, at the close of the testimony, the court sustained a motion of the defendants for a directed verdict in their favor. To reverse the judgment entered on such verdict, this appeal has been taken.

I. The alleged misrepresentations injuriously affecting plaintiff's credit and business originated, as he claims, in letters written by Petersberger to the Jewelers Board of Trade, an organization having for its object the protection of the interests of wholesale dealers in that line of business. These letters and their contents were, of course, vital to plaintiff's case against Petersberger and the Credit Adjustment Company. To meet that necessity, plaintiff filed a petition for the production of said letters, alleging that they were in the possession or in the control of Petersberger. To this application, Petersberger filed numerous objections, but did not deny his possession and control of the letters. The objections were overruled, and Petersberger was ordered to produce the let-

1. EVIDENCE:
best and sec-
ondary: due
diligence to
produce best
evidence.

ters, or copies thereof. Responding to this order he produced and there were filed with the clerk three letters purporting to have been written by himself to the Jewelers Board of Trade at Chicago, Illinois, and at the city of New York, concerning plaintiff's financial condition. The record does not disclose that these documents were offered or designated as copies, but they seem thereafter to be spoken of as such. Before the trial came on, plaintiff served notice on Petersberger to produce the originals, but he did not comply with the demand. Plaintiff also took the deposition in New York of one Stone, the secretary of the Jewelers Board of Trade, for the purpose of securing the production of the letters. The answers of the witness to the interrogatories were of an exceedingly evasive and shifty character and concluded with a refusal or failure to present or account for the correspondence. Thereafter, plaintiff moved the trial court for a continuance, to procure the desired evidence, but the motion was denied. Later, the motion was renewed and again denied. On the trial, plaintiff offered in evidence the letters or copies which Petersberger had produced in obedience to the order of the court, but they were ruled out upon defendant's objections, as not being the best evidence and as being a privileged communication from an attorney to his client. Plaintiff then called Mr. Petersberger to the stand and asked him to produce the original letters of which he had produced copies upon order of the court, and he denied having them then in his possession or under his control. Interrogatories calling for identification and verification of the copies met with like objection and like ruling. The net result of these rulings was to force plaintiff to trial without placing before the jury the letters on which he mainly relied to make out his alleged cause of action.

We think the exclusion of the copies was clearly erroneous and prejudicial. When Mr. Petersberger was ruled to produce the letters, he chose to withhold the originals and presented copies; and later, when called upon to produce the

originals, he denied having them then in his possession, and as they had been written to persons in another state, it is to be presumed that they were not within the jurisdiction of the court. Moreover, plaintiff had made a formal effort to obtain possession of the letters, by taking the deposition of the one person who could have produced the letters or accounted for their whereabouts, and had been met by palpable evasion, culminating in the witness's declaration that, as he had been subpoenaed "individually" and not "as secretary," he was instructed by counsel that he had no right "individually to touch the papers or files of the Jewelers Board of Trade." In our judgment, plaintiff had done all that in law or in reason he was required to do to unearth the letters, and the copies furnished by the defendants themselves should have been admitted in evidence. Certainly, the defendants themselves having furnished the copies, their mouths are closed to question their correctness.

The objection that the letters, being from counsel to a client not in court, were, therefore, confidential matter which the witness could not properly disclose without the client's

<p>2. WITNESSES: confidential communications: letters of attorney: client not party defendant.</p>	<p>consent is so manifestly without merit as to require no discussion. It is a fair inference from the record that Petersberger had the original letters in his possession and control when he was ruled to produce them and furnished the copies. If, then, he divested himself of the originals so that he could not produce them when called for, or even if the letters had at all times been in the possession of the addressee in another state, it would be a most unreasonable rule to say that, before the copies furnished by Petersberger himself could be used against him, plaintiff must exhaust the possibility of pursuit of the letters in the hands of an unwilling witness in a foreign jurisdiction. It is a rule we are unwilling to approve or apply. Jones on Evidence (1913 Ed.) Sec. 217, and notes found on page 266 of Vol. 1; <i>Burton v. Driggs</i>, 87 U. S. 125; 17 Cyc. 528.</p>
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It should not be forgotten that the rules of evidence are intended to facilitate the disclosure of pertinent facts, not their suppression or concealment.

II. That plaintiff paid defendants \$30 on a tentative or attempted arrangement for a settlement or composition with creditors, and that such scheme was abandoned and plaintiff

3. TENDER: became entitled to a return of his money, is
coupling with conceded; but payment thereof is pleaded.
condition: in-
validity.

The evidence shows that defendants, or one of them, sent a check to plaintiff for that amount, with a demand or requirement that he sign a release of "all claims of every kind or nature either at law or in equity growing out of contract or tort or otherwise to the date hereof which may be due, owing or claimed by me from either Isaac Petersberger or the Credit Adjustment Company." Receipt of payment on such condition was refused. Four months later, and after this suit was commenced, the Credit Adjustment Company, by Isaac Petersberger, General Counsel, sent to plaintiff by mail another check, with the statement that the payment was "in full settlement of our matters." The check also expressed upon its face to be "In full settlement." Plaintiff by his counsel notified Mr. Petersberger of his refusal to accept the same, objecting thereto because it did not include accrued interest, and gave notice that he would accept the check only as payment on account, and asked to be advised of defendant's desire in that respect. The check has never been cashed or collected by plaintiff. It is an elementary principle of law that an offer of payment upon condition that it be received or accepted in full settlement, or in satisfaction of the creditor's claims against the debtor, is not a valid tender; and a direction against plaintiff on this issue was error. Defendant's claim that the check was accepted and retained by plaintiff without objection is not borne out by the record.

III. Defendants argue that, in any event, there was no actionable defamation of plaintiff's business or his character

and standing or credit, and that, in any event, even if otherwise actionable, the communications called

4. WITNESSES: privileged communications: malice: effect: for by plaintiff were privileged. While, ordinarily, communications between attorney and client, and principal and agent, are privi-

leged, the privilege does not obtain where the statements complained of are malicious. It is possible, and perhaps probable, that, had defendants courted or permitted a frank and open exposition to the court and jury of all the pertinent facts, the claimed privilege would have so clearly appeared that a directed verdict in their favor would have been inevitable. They saw fit to pursue the other course and, by dint of multitudinous objections at every point, induced the court—erroneously, we hold—to exclude evidence having a material bearing upon the question of malice and good faith, and we cannot undertake to say what might have been the apparent merits of the case had plaintiff not been unduly circumscribed in making his proofs. In this

5. PLEADING: qualifying denial by "if." connection, it is also proper here to say that the answer of defendant Petersberger, wherein he alleges "that all communications, *if any*, that he sent to the Jewelers Board of Trade concerning the plaintiff were true and made by him in the regular course of his duty as correspondent for said Board of Trade," constitutes no answer and raises no issue. Under no system of pleading is it allowed to qualify the denial or affirmation of an issuable fact by an "*if*."

Other errors are assigned and other questions argued by counsel, but those to which we have already referred are sufficient to make necessary a reversal of the judgment below, and we shall not extend the opinion for their discussion.

For the reasons stated, the judgment appealed from is reversed and the cause remanded for a new trial.—*Reversed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

CHARLES F. THOMAS, Appellant, v. THE CITY OF GRINNELL
et al., Appellees.

WATERS AND WATERCOURSES: Diversion of Waters—Extent of
1 **Right.** Diversion of waters from their natural flow without
substantial injury to the lower proprietors is lawful.

PRINCIPLE APPLIED: Half the surface of a city drained naturally to the southeast, in which territory had been constructed a sewer, particularly for storm water but to an extent for sanitary purposes. This sewer led naturally into a creek farther to the southeast. West of this territory was a water shed and the territory of the city to the west of the water shed drained naturally to the southwest. The city proposed to build a new sanitary sewer running to the southwest through the water shed and carrying all the aforementioned and other sewage into a disposal plant, from which, after purification, it would pass into a creek farther to the southwest. A property owner along the last creek questioned the right of the city to so do. *Held*, the project would not be enjoined, it not appearing that the incidental diversion of surface and percolating water would substantially injure anyone.

MUNICIPAL CORPORATIONS: Sewerage System—Apprehended
2 **Nuisance—Action to Enjoin—Proof Required.** Self-evidently there is a marked difference between (a) an action to enjoin an act which has happened and the results of which, being known, are subject to more or less definite conclusion, and (b) an action to enjoin that which has not happened and the results of which, being unknown, are conjectural, problematical, speculative. In the latter case, the court must not be asked to assume or presume a nuisance *per se*. Proof! Proof! is the demand of the law. So held and applied in the case of the proposed enjoining of the establishment of a city sewage disposal plant.

CONSTITUTIONAL LAW: Division of Powers—Legislative Act—
3 **Necessity for—Non-review by Courts.** Courts will not assume to pass upon the necessity for a legislative act. So held in regard to the action of a municipality in establishing a sewage disposal plant.

Appeal from Poweshiek District Court.—HON. JOHN F. TALBOTT, and HON. K. E. WILLCOCKSON, Judges.

MONDAY, JUNE 21, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION in equity for a decree restraining the city of Grinnell, its mayor and council, from constructing or installing certain changes in its sewer system and from letting any contract therefor, or in any other manner authorizing such work. A motion to dissolve the temporary injunction was heard before Judge Talbott and sustained, from which ruling an appeal was taken. Later, the cause was tried on the merits before Judge Willcockson. There was a decree dismissing the petition, from which ruling an appeal was also taken. The two appeals have been consolidated and heard together. The material facts are stated in the opinion.—*Affirmed.*

C. H. Van Law, for appellant.

H. L. Beyer, J. H. Patton and W. C. Rayburn, for appellees.

WEAVER, J.—The topography of the site occupied by the city of Grinnell is such that something more than one-half its surface drains naturally to the east or southeast. Fifteen or more years prior to the council proceedings now in controversy, the city constructed a system of sewers covering something more than one half its area on the east. It would seem to have been constructed more particularly as a means of storm sewerage, but has been subjected in many instances to use for sanitary purposes. The lateral lines of the system radiated through many of the streets in the eastern and central portions of the platted part of the city and discharged into a trunk sewer in the southern part of this area, whence it was carried to the southeast along a natural line of drainage to what is known as Little Bear Creek. In the year 1914, the city council inaugurated proceedings which contemplated a new trunk sewer at a depth and grade which

would carry its flow to the southwest to a disposal plant to be provided for that purpose at or near a stream known as Sugar Creek. Into this new trunk sewer, it was proposed to lead all the flow from the original system above described, as well as from the remainder of the city territory theretofore not supplied with sewer accommodations. The enlarged system was to be used as a sanitary sewer. The plan also contemplated a disposal plant, which was to receive the discharge from the trunk sewer and, by chemical and other treatment, deprive it of its impurities and turn the remainder in an innocuous and inoffensive condition into Sugar creek. The proceedings in council were conducted, so far as appears, with statutory regularity, and the scheme of improvement having been adopted by appropriate resolutions, the mayor and council were about to let the contract, when this action was begun.

The plaintiff states the history of the proposed improvement substantially as we have above recited it, and further says that he is the owner of considerable farm land along or near the course of Sugar creek between the proposed disposal plant and the place where the creek empties into the Skunk river, and, as grounds for his demand for equitable relief, says:

1. That a sewer system of the kind and construction here proposed not only serves to carry off the unclean accumulation of sewage and the large amount of water thrown therein for the purpose of flushing the laterals and mains, but it also operates as a means of ordinary drainage, whereby the surface waters of the city's area and the seeping and percolating waters of the soil enter the sewer pipes at their joints and are discharged at the outlet. The effect of this, in the present case, he says, is to collect the ordinary drainage from all that part of the city which naturally discharges to the east and southeast and cast it on the other side of the watershed into Sugar creek, thereby unnaturally increasing the quantity of water flowing through that stream, to the damage and injury of the land owned by him and others in that neighborhood.

2. Plaintiff further says that the city of Grinnell is already adequately supplied with sewer conveniences, and there is no reasonable necessity or demand for the proposed improvement.

3. Also that, in the present natural conditions of Sugar creek and the valley through which it flows, the stream, with certain springs found along its course, supplies good and wholesome water for the use of the livestock of the adjacent landowners, and is an item of great convenience and value to them, all of which will be injuriously affected or destroyed by the diversion of the flow of the city sewers into the proposed new outlet.

Other matters of complaint are stated in the petition, but are not urged upon this appeal.

Reduced to brief terms, the argument for appellant is: First, that the effect of the change in the sewer system is to cast upon his land the burden of receiving drainage water from lands the natural drainage of which is in another direction; and second, that, if constructed, the effect of the sewer system will be to create a nuisance to his injury by corrupting the waters of the stream. Stated in still briefer terms, the objection raised is, first, to the quantity of the flow from the sewer, and second, to its quality.

I. The first of these objections is the one on which principal stress is laid in argument. The leading authority, upon which much reliance is placed by counsel, is the decision

of this court in *Livingston v. McDonald*, 21

1. WATERS AND WATERCOURSES: diversion of waters: extent of right. Iowa 160. The central principle there affirmed is of undoubted soundness, but, as

we have had frequent occasion to point out,

it does not go to the extent which is sometimes claimed for it.

It is not there decided that every diversion of water from

upon or away from the land of another

still less does it hold that equity will always

not such diversion. What it does hold is that

cannot be rightfully made "to the substantial

injury" of the lower proprietor. See page 172 of the cited volume. Referring to the quoted phrase from that opinion, we have said (*Obe v. Pattat*, 151 Iowa 723-727) that, under this rule, "to call the law into action for the defense of the servient estate, the collection and discharge of water thereon in other than the place of its normal flow in a state of nature must be in 'greatly increased or unnatural quantities' and that the damage therefrom must be 'substantial' in character. In other words, the general doctrine which recognizes a merely technical invasion of one's premises or the infliction of a merely nominal injury as sufficient grounds for invoking the remedies of the law has here no application." See also *Martin v. Schwertley*, 155 Iowa 347, 351.

An examination of this record convinces us that plaintiff fails to show with any reasonable certainty that the drainage from the city, which is merely an incident to the construction of a sewer system constructed for an altogether different purpose, will increase the flow of Sugar creek in a manner to materially injure the lower riparian proprietors. The preponderance of evidence given by engineers and experts who have examined the premises and computed both the probable flow and the capacity of the creek is to the effect that such increase will not swell the volume of water to an extent liable to injure adjacent lands. It is unnecessary to go into a recitation of the figures and estimates given by the engineers and others. It is enough to say that the showing of anticipated injury is not so clear or certain that we can interfere in advance and place our veto upon a proposed municipal improvement which may be of great, if not vital, importance to the convenience, comfort and health of a large community, which is willing to assume the burden of its construction and maintenance, and to guard its operation in a manner to prevent its becoming a nuisance to others. Men of great learning and wide experience, who have familiarized themselves with the subject, express the view that the incidental drainage of surface and percolating waters will

not be enough to create a burden upon the plaintiff or his property. Manifestly, any estimate which can be made of the amount is largely speculative and affords a very unsubstantial basis on which to nullify the act of a city acting within the scope of its express statutory authority.

II. Can this court assume in advance or find from the evidence that the city will neglect or may not be able to install a disposal plant which will effectually remove the unclean

elements from the sewage and purify the water which it discharges into the creek?
2. MUNICIPAL CORPORATIONS: sewerage system: apprehended nuisance: action to enjoin: proof required. Undoubtedly, it has no right, nor is it within the power of this court to give it a right, to cast filth or other poisonous substances into

the stream, injuring its quality for ordinary uses. But what appellant asks us to do is to hold that he has proved that such is the purpose of the defendants, or at least that such will be the natural or necessary result if they are permitted to proceed with the improvement. Such a ruling would be arbitrary in the extreme. It is a matter of common knowledge to the civilized world that competent men have long been laboring to bring about a successful method by which sewage may be disposed of in a sanitary manner without befouling our lakes and streams. We know also that many plants of that kind have been and are being established in these western states where the need of such relief has been acute. In many instances, they are reputed to work satisfactorily. None of the experts testifying in this case deny the practicability of devices of this nature, and as a whole their opinions appear to justify the venture by the defendant city. The most serious criticism offered is that of one engineer who doubts whether the capacity of the filter beds is adequate, a fault which, if found to exist, ought to be remedied without condemning the whole system. The court cannot be supposed to have any technical information upon these subjects upon which it can reject the testimony and declare that the opinion of all these experts is worthless and that, if a disposal plant is built accord-

ing to the best approved methods, it will prove a nuisance *per se*. And while conceding that the dumping of large quantities of filth into a stream may create a nuisance which the courts would enjoin in advance of the wrongful act if threatened, we are not yet prepared to say, as a matter of law, that a sewage disposal plant may not be so constructed and carried on as not to be a source of annoyance or injury to anyone. The ultimate risk is upon the city. As we have already intimated, this decision does not clothe the city with immunity against liability if it shall in fact create a nuisance to the injury of others. The general rule is that no injunction will be decreed except upon a clear showing of injury, and the court must in each instance act with full conviction of its urgent necessity. 1 High on Injunctions, 4th Ed., Sec. 22.

It must clearly appear, not only that the defendants are about to do the act alleged in the petition, but also that such act will be attended with the apprehended injurious consequences. In Kerr on Injunctions, (5th Ed.) 157, it is said, "The court will not in general interfere until an actual nuisance has been committed; but it may by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance." That a sewer system with a proper disposal plant upon the bank of a stream is not a nuisance *per se* has already been held by this court in *Hollenbeck v. City of Marion*, 116 Iowa 69, 77, where it is said, "It may be that the sewer system was permanent in character; but it does not follow that its use will always be such as to constitute a nuisance. It is well known that modern scientific research has discovered means of disinfecting and deodorizing sewage, so that it is practically innocuous." It has also been repeatedly decided that if a business may be so conducted as not to be a nuisance or a given act can be done without material injury to another, it will not be enjoined simply be-

cause the person asking it fears that a nuisance *may* result. *Shiras v. Olinger*, 50 Iowa 571; *Faucher v. Grass*, 60 Iowa 505. See also *McLaughlin v. Sandusky* (Neb.) 22 N. W. 241.

In the *Shiras Case*, *supra*, plaintiff sought to enjoin the use of a building as a livery stable in close proximity to his residence, and it was there said, "Inasmuch as a livery stable is not a nuisance *per se*, and it is not impossible that a change may be introduced which would obviate all objections, we think the decree (of the district court) enjoining the use absolutely went too far." In the *Faucher Case*, the subject of controversy was a blacksmith shop, and we said, "If a house or shop may be so constructed upon the lot wherein the business of blacksmithing may be carried on in such a manner as to cause no annoyance or injury to plaintiff, it ought not to be regarded as forbidden. . . . Equity will not restrain further use of the lot for a smith's shop, if it may be used without proving to be a nuisance."

Applying the same principle to the case at bar, we repeat what we have already in substance expressed, that the evidence in the record is insufficient to demonstrate with any degree of certainty that the sewer system, if made and completed according to the proposed plan, will prove a nuisance; and the court is, therefore, not justified in condemning it in advance and enjoining its construction.

III. Considerable is said in argument to the effect that there is no reasonable necessity for the improvement and that the present system is, or can be made, sufficient for the

needs of the city and its inhabitants. This is not a question we are authorized to consider. The finding of the necessity and propriety of such improvements is committed by the statute to the city itself, acting through its mayor and city council. The authority so given is legislative in character, and if the proceedings have been conducted in accordance with statute, the finding by the council that a work of public improvement is necessary or expedient, and

8. CONSTITUTIONAL LAW: division of powers: legislative act: necessity for: non-review by courts.

its action in ordering the work of construction to proceed, are not subject to judicial review or control. It may be said, however, that the record demonstrates that, owing to its differences of level, the entire city of Grinnell cannot be served by a single sewer system carrying its flow to the east or southeast, while with the proposed changes in the system, it can all be carried to a common outlet at the southwest. Under such circumstances, the finding that it was desirable to have the entire flow discharged at a single outlet and cared for in one disposal plant instead of two is apparently not unreasonable. It is well within the scope of the power conferred upon the city, and the regularity of the proceedings is not challenged.

It follows of necessity that the decree of the district court must be and it is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

ERNEST F. THOMPSON, Appellant, v. THE CUDAHY PACKING
COMPANY, Appellee.

TRIAL: Directed Verdicts—Test to Determine—Allowable Inferences. When the court is met by motion to direct a verdict, it should carry to the aid of the evidence every inference reasonably permissible in support of the issues. Motion held properly sustained.

MASTER AND SERVANT: Negligence—Action—Chosen Grounds of Negligence—Failure to Prove. It is hornbook law that a plaintiff must stand or fall on his chosen ground of negligence.

PRINCIPLE APPLIED: Hams were conveyed to the servant's table by a mechanical carrier. His duty was to trim the hams and throw them into a truck. His chosen ground of negligence was: "That defendant neglected to provide a truck into which he could throw the hams, whereby the hams which he had trimmed became so piled up as to render the place unsafe; and that a ham was thrown upon the table either from the carrier or by dropping from the pile and drove a knife through his hand." The record

showed (a) that the servant was under no command to so pile up the hams, (b) that an unfilled truck was at hand, and (c) plaintiff did not know whether the ham that hit him dropped from the pile or from the carrier or was one thrown upon the table by a fellow workman. *Held*, directed verdict against plaintiff was inevitable.

Appeal from Woodbury District Court.—HON. DAVID MOULD, Judge.

TUESDAY, MARCH 16, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION at law to recover damages for personal injury. There was a directed verdict and judgment for defendant and plaintiff appeals.—*Affirmed*.

O. E. Martin and W. E. Gant, for appellant.

Sears & Snyder, for appellee.

WEAVER, J.—The defendant corporation is a meat packer at Sioux City, Iowa, and at the time in question, plaintiff was one of its employes in that business. His work at that time was the dressing or trimming of shoulders of pork, which were brought into his room or place of employment upon a conveyor or carrier of some kind. It was his business to receive and trim them and throw them into a truck or trucks which were provided for their removal. The injury of which he complains, he alleges was caused in the following manner: that while he was at work at his proper table the defendant neglected and failed to keep him supplied with trucks with sufficient promptness to enable him to remove the shoulders as fast as they were trimmed, with the consequence that they accumulated on the table to a considerable height, rendering the place unsafe; and as he was at work, a shoulder coming in on the conveyor was thrown upon the table or fell from the pile accumulated there, striking the sharp knife held by plaintiff, driving it through his hand in such manner as to

severely cut and injure his index finger, from which injury he suffered pain and loss of time; and the wounded finger has thereby been made stiff and useless and is a detriment to his capacity and efficiency as a working man. The petition is denied by the answer. There is also an attempt to plead an assumption of the risk of the danger such as appellant complains of.

The question presented by the record is whether plaintiff made a case on which he was entitled to a verdict of the jury. In answering this inquiry, he is entitled to the benefit of all

the facts which the evidence offered by him tends to prove, giving them the most favorable construction of which they are fairly susceptible in support of his claim. Even

when thus considered, we think the conclusion inevitable that the ruling of the trial court must be sustained. The fatal defect in plaintiff's case is his failure to show actionable neg-

ligence on the part of defendant, and this we think must be the holding though we concede the literal truth of all the testimony given by him and of all the matters of fact which he offered to prove but which were

excluded on the defendant's objection. If it should be conceded that the defendants did not furnish trucks enough to carry away the shoulders as fast as they were trimmed, plaintiff was under no order or command or obligation to pile them upon his table where they would endanger his safety. Indeed, testifying as a witness, he seems to abandon the claim that the necessary trucks were not furnished; for he concedes that there was, and for half an hour before he was hurt had been, a truck at hand into which he was throwing the shoulders, and it was not yet filled when his injury occurred. He was then asked: Q. "The only reason the shoulders piled up there was because you did not get them away as fast as they came to you?" and to this he answered, "Yes, sir." He further says, "I did not say anything to anybody about that

1. TRIAL: directed verdicts: test to determine: allowable inferences.

2. MASTER AND SERVANT: negligence: action: chosen grounds of negligence: failure to prove.

and kept on working and allowed them to pile up." When brought to the central question what it was that struck his knife and caused the wound to his hand, he is unable to say whether it was a shoulder falling from the pile on the table or one which was thrown on the table from the conveyor by a fellow workman. He does not even say that the shoulders were sent to him faster than he could have trimmed and thrown them into the truck had he been so disposed. The one charge of negligence is that defendant permitted the place of work to become unsafe "in that it failed and neglected to provide a suitable receptacle or empty truck into which plaintiff could throw the shoulders which had been dressed by him," whereby the shoulders accumulated and piled up in the manner described. This allegation, as we have seen, is distinctly negatived by his own testimony that he had an unfilled truck at hand into which the dressed shoulders could have been thrown, at the very time that he charges that his place of work was made dangerous by the lack of such facilities; and his further concession, that he cannot tell whether the knife was driven through his hand by a shoulder falling from the pile or by one tossed upon the table by a fellow workman, makes plain a failure of proof that his injury was proximately caused by any negligent act or omission of the defendant. This is too clear to justify further argument or discussion. To recover, he must prove the negligence charged. This he has not done. On the contrary he has disproved it.

Many exceptions were preserved to rulings on evidence, but our conclusion that plaintiff's own showing and admissions are such as to preclude a recovery upon any theory of the issues joined in this case, makes it unnecessary for us to pass upon them.

For the reasons stated, the judgment of the district court is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

PRUDENCE B. THOMPSON, Administratrix, Appellee, v. AUGUST P. THOMPSON, Appellant.

GIFTS: How Effected—Evidence—Intention. No stereotyped form
1 of evidence is required in order to effect a gift. *Intention* is the pivotal question. In the instant case, it was held that a jury question, whether a father intended to effect a gift to his son of certain notes, was presented by (1) a series of unconditional assignments of, and indorsements on, notes, (2) a power of attorney, (3) a receipt for said notes and (4) oral testimony in relation thereto.

EVIDENCE: "Parol Evidence" Rule—Nonapplication of Rule—
2 **Searching for Intention of Parties.** The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument does not, *in the search for the questionable intention of the parties*, close the door to oral evidence which is not inconsistent with the writing.

PRINCIPLE APPLIED: A son claimed that his father had made to him a gift of five notes. The representatives of the estate claimed that the father did nothing more than to constitute the son his attorney in fact. The evidence bearing thereon was: (1) A written instrument in the nature of an assignment of the notes to the son, accompanied by an unconditional indorsement of the notes to the son, all executed by the father without the knowledge of the son; (2) a *general* written power of attorney (executed some months later) along with five unconditional separate written assignments of the mortgages securing the notes, with delivery of the notes to the son, all executed by the father to the son with the knowledge of the son; (3) a written receipt for the notes, executed by a banker to the son, in the presence of the father. *Held*, oral evidence was admissible by both parties: by the son to show an *intention* to effect a "gift"; by the representatives of the estate to show an *intention* to constitute the son an attorney in fact only.

GIFTS: Intention—Series of Written Instruments—Relative Im-
3 **portance—Construction.** In the consideration of a series of written instruments, all consistent with either one of two conflicting theories or contentions, the court was not justified in instructing the jury that a particular one controlled the others.

PRINCIPLE APPLIED: (See No. 2.) *Held*, the entire series of writings, including the oral testimony, presented the pivotal question of intention and that the general power of attorney was not *per se* the controlling instrument.

TRIAL: Instructions—Submitting Nondisputed Questions—Error.

- 4 Nondisputed questions should not be submitted to the jury. Such submission held error.

TRIAL: Instructions—Leading Jury away from Ultimate Question—

- 5 **Error.** The task set for the jury should be to pass directly and exclusively on the pivotal questions at issue. An instruction which carries the jury away from such pivotal question and assigns to it the task of solving some other question as “the real test,” can have no other effect than to lead the minds of the jury away from the pivotal question, with consequent confusion.

PRINCIPLE APPLIED: The question at issue was (a) whether a father had, by a series of instruments, transactions and statements, delivered certain notes to his son as a gift, or (b) had only intended to appoint his son as his attorney in fact. The *intention* of the father was the pivotal question. Instead of instructing the jury to determine this question of *intention*, the court instructed in substance:

“The real test is, if said notes were paid off before the death of the father, would the father have been entitled to the money so paid as his own.” This thought was repeated in other forms in the same instruction. *Held*, error.

Appeal from Wopello District Court.—HON. FRANCIS M. HUNTER, Judge.

SATURDAY, JUNE 19, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

ACTION at law by the administratrix of the estate of Edward C. Thompson against the defendant to recover for the alleged conversion of certain five notes, the property of the decedent. Defendant admitted the possession of the notes and appropriation thereof to his own use, but denied the conversion and set up a written endorsement and assignment

of each of the same by the decedent to himself. There was a verdict for the plaintiff. The defendant appeals.—*Reversed.*

Gilmore & Moon, for appellant.

John W. Lewis and Tisdale & Heindel, for appellee.

EVANS, J.—This case has one unique feature. The defendant filed a motion for a new trial, based in part upon newly discovered evidence. The newly discovered evidence was that of the plaintiff herself. Defendant's motion for a new trial was supported by the affidavit of the plaintiff, wherein the facts involved in the controversy were set forth as the plaintiff claimed them to be. Such facts supported the contentions of the defendant upon the merits of the case. This motion was resisted by plaintiff's counsel on the ground of want of diligence and other grounds. The plaintiff, Prudence B. Thompson, is the widow of the decedent and the mother of the defendant. The defendant is the son of decedent. Other heirs of the decedent are a daughter and certain children of a deceased son. Originally, Watson Enyart was appointed administrator of the estate. He instituted this suit. Shortly before the trial, however, he resigned, and Prudence B. Thompson was appointed in his stead. The case proceeded in her name in charge of the same counsel. She did not testify upon the trial nor personally appear therein. There was an oral understanding between the opposing counsel that, because of her weak condition, she would not be called by either party. This accounts in part for the somewhat anomalous situation here presented. The real parties interested in the prosecution, other than the plaintiff and defendant, are, of course, the other heirs. This feature of the case is referred to here because it explains some apparent inconsistencies of the parties at various points in the case.

Because of our conclusions upon other features of the case, we do not undertake to pass upon the sufficiency of the

showing of newly discovered evidence as a ground for a new trial.

1. GIFTS : how
effected : evi-
dence : inten-
tion.

Edward C. Thompson died November 12, 1909. Some-
time prior to his death, he was possessed of
certain personal property, consisting of cer-
tain notes and money in bank, which is set
forth in the plaintiff's abstract as follows:

One by Abbie G. and Eugene Bertrock.....	\$ 600.00
Jennie McShane.....	1,500.00
J. J. Beall.....	2,500.00
A. I. and Endora Marston.....	1,500.00
Lottie H. Allen.....	750.00
F. M. and J. S. Reno.....	300.00
Note, maker unknown.....	100.00
Money in bank.....	450.00
	<hr/>
	\$7,700.00

The controversy between the parties arises over the own-
ership of the first five notes enumerated above. The defendant
makes no claim to the last three items. Each of the five notes
in question was secured by a mortgage on real estate. The
decedent had been ill for some time prior to his death. On
the first or second day of January, 1909, he called in two
friends to witness a proposed transaction on his part and to
aid him therein. These were Allen and McDowell. At that
time, he executed the following paper, which is known in the
record as Exhibit A:

“Agency, Iowa, Jan. 1st, 1909.

“This is to certify that I have this day transferred to
A. P. Thompson, my son, all my notes and mortgages that
are now in my possession and owned by me. For to dispose
of as he sees fit, and to transact any other business as he may
see fit in the premises.

“Signed by me this 1st day of Jany., 1909.
“E. C. Thompson.”

This paper was prepared by Allen and was sworn to by the decedent before Allen as a notary public. At the same time, he endorsed the five notes in question as follows:

“Pay to the order of A. P. Thompson.

(Signed) E. C. Thompson.”

The actual writing of this endorsement was done by Mrs. Thompson (the plaintiff herein), under the direction of the decedent. Allen and McDowell both testified in substance that he stated that he intended to give such notes to the defendant (who is generally referred to in the testimony as Gussie). The defendant was not present at this time nor did he know anything about this transaction until October 21st following. Nothing further was done by the decedent until such later date. On October 21st following, he sent for Watson Enyart, cashier of the bank where he transacted his business in the town of Agency, who came to his home at such request. What actually transpired on that day in the way of oral conversation is in dispute. Enyart testified as a witness for the plaintiff as follows:

“He said: ‘Watson, I am getting old and not able to get around in good shape. I want you to draw me a paper, draw up some article so my son Gussie here can transact my business and look after my affairs’, and he produced an article, a sort of power of attorney. He produced a paper and said it had been drawn up a year before, but he had never had occasion to use it, and he showed it to me and wanted to know if that would do. I looked it over and I told him I was not enough of an attorney to tell whether it was exact or not, but that I had a book of forms up to the bank that I used on such occasions and that I could copy one out of that if he would like. He said: ‘Well, you do that for me.’ Well, I told him I would have to go back to the bank in order to do that, and so I left and went back to the bank and copied a power of attorney on the typewriter and fetched it down

along with my notary seal and such papers that I have to carry in a big book that I have when I go out on a notary job. I took to his house some blank assignments, my receipt book and my seal. I also took some notes and mortgages that he had left in the bank. It was after noon when I got down to the house the second time. . . . I read to him the power of attorney that I had drawn up and he said that that was all right and he signed it and I put my seal on it, then, I stated to him that in order that Gussie Thompson might be able to release these mortgages without any trouble it would not be a bad idea to have these assignments, and the assignments were made out after we got through, and the old gentleman told me to take the notes back to the bank as I knew these people and they were in the habit of paying the interest there and I gathered up the notes, and Gussie Thompson asked me about the assignments, what he was to do with them, and I told him it would be better for him to take them to the court house and have them recorded, and I left the power of attorney and the assignments with him. I took the notes and mortgages back to the bank. The defendant said nothing to me about what I should or should not do with the notes and mortgages. Exhibit A is the paper the old man showed me when I went down there in the forenoon, the paper which he had had drawn up a year before and had never used, and asked if it would do. . . . After signing the power of attorney, Edward C. Thompson directed one of his granddaughters to sign these papers, these assignments. Then he acknowledged them as his signatures. I am not able to say which one of his granddaughters it was. The notes and mortgages remained at the bank from that time until after the old gentleman's death. . . . There were five assignments in all. I think I filled them out in the bank, all except acknowledgments. I suggested these assignments. I left the power of attorney, Exhibit B, and these assignments, on the table there where we were doing the writing, in E. C. Thompson's house in Agency. The

defendant was present there when I left them. Exhibit B was the first paper signed, and the assignments were signed immediately following. I did not see defendant or anyone else than myself from the day I took these notes and mortgages back to the bank until after the old man's death, have anything to do with them."

The paper then signed by the decedent is known in this record as Exhibit B, and is as follows:

"Agency, Iowa.

"Know all men by these presents, that I, E. C. Thompson, of Agency, Iowa, Wapello county, have made, constituted and appointed and by these presents do make, constitute and appoint my son, A. P. Thompson, my true and lawful agent for the purpose of transacting my business, as, paying out, and collecting in, moneys, signing checks, releasing mortgages, and loaning of my money, giving and granting unto my said agent full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes, as I might or could do if personally present.

"In witness whereof, I have hereunto set my hand and seal this 21st day of October, 1909.

"(Signed) E. C. Thompson."

Formal written assignments of the mortgages also were executed, and all papers that day signed were similarly acknowledged before Enyart as a notary public. In addition to the foregoing, it was admitted by Enyart on cross-examination that he executed to the defendant a separate written receipt for each of the five notes now in controversy and that this was done then and there in the presence of the decedent. He also testified on cross-examination:

"I would not say that I did receive these notes from the defendant on October 21st. They were lying on the table

there, I could not say I received them from the hands of either man, they were lying on the table and Mr. (Edward C.) Thompson told me I had better take them back to the bank, and he turned to his son and said, 'You better have him take them back to the bank.' After he spoke to me, the old man said to his boy, 'You had better let him take them back to the bank,' that in substance. Gussie (the defendant) did let me take them back to the bank, and I gave him these receipts at the time. . . . When I drew this power of attorney (Exhibit B), I was of the opinion that that in itself was not sufficient to enable the defendant, as the old man's agent, to release mortgages. I did not know much about the law on the subject, but I was going a good deal by what I had to do when I wanted to release a mortgage. I never acted under a power of attorney, and am not familiar with its use in general. There was no way to release these mortgages is the reason I told him so that he would not have any trouble in releasing these mortgages. I explained to Mr. (Edward C.) Thompson that if he made the assignments to Gussie and had them recorded that Gussie could go there in person and release these mortgages.''

On re-direct examination he testified as follows:

"The defendant did not say anything to me that day in the way of ordering or instructing me about what I should do with the notes and mortgages. When I started out I left the power of attorney and assignments there and Gussie turned to me and said, 'What shall I do with these?' I told him I thought it would be better to record them.'"

On the other hand, there was testimony on behalf of defendant of other witnesses who were present on October 21st to the effect that the decedent said he wanted to give the notes in question to his son Gussie, and that, as he read the paper Exhibit B, when presented to him by Enyart, he said it was not "strong enough." There is no claim that the

decedent ever attempted to exercise any dominion over the property after that date; nor, on the other hand, was there any affirmative act done in relation thereto by the defendant after October 21st and before the death of his father. The oral evidence on behalf of the defendant was sufficient to sustain a finding that the transaction of October 21st was intended by the decedent to consummate a gift of the five notes in question to his son. On the other hand, the oral evidence of Enyart on behalf of the plaintiff was sufficient to sustain a finding that such transaction was intended to clothe the defendant only with the power of an attorney in fact, and for the purpose of enabling him to transact the business of the decedent. The ultimate merits of the case rest upon the question of whether or not the decedent intended a gift to his son.

The theory of the plaintiff appellee was and is that the paper Exhibit B was the "controlling" paper of the case, and that it cannot be contradicted either by the oral evidence

or by the instruments; that the other instruments must be construed so as to support it, and all oral evidence inconsistent therewith must be rejected; that Exhibit A should be rejected because it never went into effect and

because it was superseded by the subsequent instrument, Exhibit B. In a general way, this theory was adopted in the instructions. The theory thus put forward is somewhat mis-

leading. It may be assumed that Exhibit B

may not be contradicted by oral evidence.

The same rule applies, however, to the other written instruments. The mere fact that

Exhibit B was executed subsequently to

Exhibit A is not of itself sufficient to render Exhibit A nugatory. Otherwise, Exhibit B might itself be deemed nugatory because of the subsequent execution of the written assignments of the notes and mortgages. These were absolutely unconditional in form. The oral evidence of gift was admit-

2. EVIDENCE:
"parol evi-
dence" rule:
non-applica-
tion of rule:
searching for
intention of
parties.

3. GIFTS: inten-
tion: series of
written in-
struments:
relative im-
portance:
construction.

tedly not inconsistent with any written instrument introduced in evidence, unless it be Exhibit B. Clearly it was not inconsistent with Exhibit A, nor with the endorsements on the backs of the notes, nor with the written assignments of the notes and mortgages, nor with the receipts executed by Enyart to the defendant. Was it necessarily inconsistent with the power of attorney, Exhibit B? We think not, and for two reasons:

(1) The power of attorney was general in its terms and was capable of application to the other notes of the decedent and to the money in the bank. It did not purport to apply to the specific notes in this controversy.

(2) Assuming that the decedent really intended to make a gift of the notes in question, we see no insuperable reason why it might not be shown by oral evidence that a formal power of attorney was executed as a means of effectuating the gift. It would be an awkward means, it is true, but if it were shown that it was actually adopted for that purpose, we see no reason why it should not be deemed effective to that end. It was so held expressly in *Murphy v. Bordwell* (Minn.), 85 N. W. 915. We are of the opinion, therefore, that none of the written instruments appearing in this record were necessarily inconsistent with the alleged intent on the part of the decedent to make a gift of these certain notes to his son; and this is so whether these instruments be considered separately or as parts of one transaction.

On the other hand, there is no statement in any of such written instruments whereby the decedent purported to make a gift of these notes as distinguished from a mere transfer thereof. It follows that it was competent for the plaintiff to show by oral evidence that the several instruments were intended to constitute one instrument and were in effect one transaction and that the real purpose thereof was to clothe the defendant with full power as an attorney in fact. The ultimate question between the parties is: Did the defendant receive these notes as a donee or as an attorney in fact? This

question is not conclusively answered by any written instrument. While it is true that the written assignments and endorsements on the back of the notes would present a good defense to a mere claim of conversion of the notes, it does not follow, in the absence of an intended gift, that the defendant could not be held to some other form of liability by appropriate pleading which would take account of the unpaid consideration, if any.

In here stating the ultimate issue between the parties, we are following the arguments of counsel on this appeal. They agree that the vital issue is as here stated. The case thus argued and the case made by the evidence is not the case made by the pleadings. The petition declared a conversion of the notes. The answer denied the conversion and set up the written assignments. There was no affirmative allegation in the answer of an intended gift. As already indicated, the written assignments standing alone presented a sufficient defense to the claim of conversion. No reply thereto was filed by plaintiff. But the real controversy that developed at the trial was whether there was an intended gift. This was the main issue submitted to the jury and this is the question argued here. We therefore treat the issues as they have been argued before us, rather than as they were pleaded in the court below. This is manifestly to the interest of both parties, in that it enables us to deal with the ultimate merits of the case as disclosed by the evidence. The foregoing analysis of the issues and the evidence will enable us to deal more in detail with the alleged errors assigned.

I. The appellant complains of instruction 21. By this instruction, the trial court submitted to the jury the question of whether there had been any delivery of the notes and mortgages in controversy on October 21st.

4. TRIAL: instructions: submitting nondisputed questions: error.

The instruction is assailed as to the manner in which the question was submitted, and also on the ground that the question should not have been submitted at all. The argument is that delivery

was shown by the undisputed testimony of both sides. We have already recited the facts pertaining to the delivery in our foregoing statement. It appears therefrom that Enyart carried the notes and mortgages with him to the bank, having first signed a receipt for each one to the defendant personally. This was done in the presence of the decedent. The written assignments and the other instruments were taken by the defendant personally. According to Enyart, the decedent said to his son, "You better have him (Enyart) take them back to the bank." Taking the facts as stated by Enyart and not disputed by anyone, they leave no disputed question of delivery to be settled by the jury. Under these undisputed facts, there was a legal delivery of the notes to the defendant on October 21st and the jury should have been so instructed. *Tucker v. Tucker*, 138 Iowa 344; *Stokes v. Sprague*, 110 Iowa 89; *Irwin v. Deming*, 142 Iowa 299; *Poullain v. Poullain*, 79 Ga. 11.

True, such delivery did not of itself prove the gift. But if the intent to make the gift was proved, then such delivery effectuated the gift. On the other hand, if only an agency was intended, then the delivery was in pursuance of the agency. In other words, whatever transaction was intended on that day was effectuated by adequate delivery.

II. Appellant complains of instruction 6. Such instruction contained the following statement:

5. TRIAL: instructions: leading jury away from ultimate question: error: " . . . The plaintiff claims that said Edward C. Thompson retained to himself and at the time of his death was the actual and real owner of said notes and mortgages. Now the real test is, if said notes, or any part of them, were paid off after October 21st, 1909, and before the death of Edward C. Thompson, would Edward C. Thompson have been entitled to the money so paid on the notes, to keep, use, spend or otherwise dispose of as he might elect, without the knowledge or permission of any other person, just as men usually

keep, control and spend their own money? If you find Edward C. Thompson would have been so entitled to the proceeds of said notes, if they or any part of them had been paid during that period of time, no matter whether paid to him personally or to any other person; then he was the actual and real owner of the said notes and mortgages at the time of his death, even though the endorsements had been made on the notes and the mortgages had been transferred, and even if the notes and mortgages may have been, at the time of such supposed payment, in the possession of some other person or persons."

We think it must be said that the effect of this instruction was to lead the jury away from the pivotal question. Of course, if the decedent did not make a gift of the notes to his son, then he necessarily remained the owner thereof until his death. The jury could not say whether he was or was not the owner without first determining the question of whether he had made a gift to the son. *This was the test.* The other followed as a necessary result.

III. We think, also, that the exception to instruction No. 10 must be sustained. This instruction treated the provisions of Exhibit B as being controlling and decisive if it was intended to include the notes and mortgages now in controversy; that is to say, if all the instruments should be regarded as one transaction. This ignored the question of whether a gift was actually intended and whether the written instruments, including Exhibit B, were made with the intent to effectuate the gift. It treated Exhibit B as being necessarily contradictory in its terms to the claim of gift, and to be decisive against such claim in the event that only one transaction was intended. As already indicated, we find that there is nothing in the terms of Exhibit B which would necessarily forbid the fact of gift to be found.

What we have already said is quite decisive of all the questions argued before us in the very extensive briefs of

counsel. The one controlling question of fact in the case is: Was or was not a gift intended by the decedent? That question being answered, all else follows. If a gift was intended, there was sufficient delivery to effectuate it. If a gift was not intended, there was no gift. Whatever the intent, the delivery effectuated it.

For the reasons indicated, a new trial must be awarded, and the judgment below is therefore—*Reversed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

JOHN WRIGHT, Complainant, v. DISTRICT COURT et al.,
Respondents.

INTOXICATING LIQUORS: Constructions against Evasions—Duty
1 of Court. The statute (Sec. 2431, Code, 1897), directing such construction of the Intoxicating Liquor Act as will prevent evasions of the act, neither authorizes nor permits arbitrary action against the accused, but it does emphasize the duty of the court to scrutinize the record to prevent evasions. Evidence reviewed, and held to support a conviction for contempt.

INTOXICATING LIQUORS: Violation of Statute—Evidence—Certi-
2 **fied Copy of Federal Tax Receipt Holders.** The certified copy, provided for in Sec. 2427-a, Sup. Code, 1913, of the names of those who have paid the Federal tax on the sale of intoxicating liquors is prima-facie evidence that such persons are selling and keeping for sale intoxicating liquors in violation of law.

Certiorari from Polk District Court.—HON. W. H. McHENRY,
Judge.

MONDAY, JUNE 21, 1915.

REHEARING DENIED SATURDAY, OCTOBER 2, 1915.

THE opinion sufficiently states the case.—*Annulled*.

M. S. Odle, for complainant.

Dunshee & Haines, for respondents.

WEAVER, J.—On May 20, 1914, in an action then pending in the district court of Polk county, the defendant, O. H. Meyer, was perpetually enjoined from illegal traffic in intoxicating liquors at his place of business in Des Moines and elsewhere in that judicial district. Thereafter, on September 5, 1914, information was filed charging him with a violation of the injunction. Appearing to the proceeding, Meyer admitted having been enjoined as alleged, but denied that he was or had been in contempt of the writ. Upon the trial, the prosecution introduced as a witness one Tuttle, who testified that he and one Wilson, on September 2, 1914, visited defendant's place of business, where they bought two bottles of beer and sandwiches; that they there drank the contents of one of the bottles and carried the other away with them. Wilson also testified, corroborating the story told by Tuttle. One Hulburt swore that at or about the same time, he purchased two bottles of beer at defendant's place. These witnesses saw beer bottles being brought out of the booths where others were apparently drinking. On the part of the defense, the head waiter at defendant's place of business testified that he did not remember the occurrences sworn to by Tuttle, Wilson and Hulburt, and that no beer was sold there that he knew of. He said, however, that people often brought beer there at night and drank it with the lunch which was there served them. At the request of such persons, the waiters would place the beer in the defendant's ice chest to cool and when, during the lunch, such customers would call for their beer, waiters would get it and bring glasses for their use. This would occur frequently—every night. Other waiters testified to the same general effect. Two policemen testified to their familiarity with the place, one of them saying he put in most of his time there. Both saw beer drinking there and both took the word of Meyer that he was selling nothing. One of them even heard Meyer refuse to sell a man whisky in his presence, and heard applicants for beer informed that there was "nothing doing." Meyer, testifying in his own behalf, says he keeps a restaurant and he does not remember seeing these three

witnesses come in there. Never saw them before. Never heard any talk about beer with them. No liquor sold in that place to his knowledge. Being asked by his own counsel whether he paid a revenue liquor tax or had a liquor revenue stamp, he testified very positively that he never "bought any license to sell beer there". "I hold no stamp." "I know nothing about that." On having the question repeated and the meaning of the interrogatory explained to him, he repeated very positively that he never bought a federal stamp for the sale of liquor there. On cross-examination, he again said, "I have not paid the internal revenue for selling beer anywhere." His attention then being directed to the fact that his name had been certified by the revenue department as the holder of such a stamp, he said that when he was enjoined, he told the revenue officer that "if it had been proven that liquor had been drank there" he would pay it, and added, "I did pay it. There was a man told me some time ago I would have to pay it so I paid it then." His final statement was to the effect that he paid the revenue tax to cover past delinquencies, and not for protection of future business. Upon rebuttal, the certified list of revenue stamp holders was introduced in evidence, showing defendant to hold license or stamp No. 218, issued July 28, 1914, the entry being followed by ditto marks under the date August 13, 1914, which seems to have been a date entered in connection with the filing of a list by the county attorney in the auditor's office for the fiscal year ending June 30, 1913. Upon this showing, the trial court held that a case for punishment for contempt had not been made out, and dismissed the proceeding at plaintiff's costs.

In our judgment, the information against Meyer has sufficient support in the evidence. Courts are, by statute, Code Sec. 2431, required to so administer the law for the suppres-

sion of the liquor traffic as to prevent its evasion. This does not require or authorize the court to hold the defendant guilty of contempt without substantial evidence on which to base the finding, but it does emphasize the court's duty to

1. INTOXICATING
LIQUORS: con-
structions
against eva-
sions: duty of
court.

scrutinize the record and, if an offense is fairly established, to assess the penalty which the statute prescribes. In this case, the defendant kept an all night restaurant, where many people congregated. Five or six waiters were on duty until after midnight, and three for the remainder of the night. The defendant was in the active management of the place. According to their own admissions, much beer was being drunk at their tables and in the closed booths. They were furnishing the place to drink, were cooling and carrying the beer and supplying glasses to the drinkers. All this *may* have been possible and defendant not be guilty of illegal selling or keeping for sale; but it is equally possible, and we think it much more in accord with the theory, that he had a more intimate and profitable connection with the furnishing of these liquors than he is now disposed to admit. When to these significant circumstances we add the fact that three unimpeached witnesses testify to actual purchases at this place of business, and the conduct of the defendant in paying the internal revenue tax as a liquor dealer, the conclusion of guilt is not reasonably avoidable. The denial made by the defendant and his witnesses is marked by a hesitation and indefiniteness which deprives it of much of the force it might otherwise have had, and the explanation of the payment of the internal revenue

2. INTOXICATING
LIQUORS: vio-
lation of stat-
ute: evidence:
certified copy
of Federal tax
receipt holders.

tax is not convincing. His persistent and repeated denial of such payment until the questions of counsel disclosed that his name was on the certified list of stamp holders justifies much hesitation in accepting the absolute veracity of his other denials. The statute, Chapter 105, Laws of the 34th General Assembly, makes the payment of the tax prima-facie evidence that the person paying it is engaged in the sale of intoxicating liquors or in keeping them with intent to sell. The payment by the defendant was concededly made after he had been enjoined, and but a short time prior to the alleged sales to Tuttle, Wilson and Hulburt. The burden was upon him to satisfactorily explain this incriminating

circumstances, and this we think to be the case. The case is in many respects quite parallel with that of *Jones v. Webb*, 157 Iowa 443, and has features in common with *Snyder v. Frost*, 152 Iowa 241.

On the whole record, we are satisfied that defendant should be adjudged guilty of contempt. The ruling of the trial court is therefore annulled, and the cause is remanded for disposition in harmony with this conclusion. The costs of this appeal, with an attorney's fee of \$25.00, will be taxed to the respondent Meyer.—*Annulled*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

G. H. BLAKE, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee.

TRIAL: Instructions—Unsupported Theory—Negligence. It is error
1 to instruct on a theory not supported by the evidence. So held in negligence case.

PRINCIPLE APPLIED: A team was alleged to have run away because of steam escaping from defendant's engine in violation of an ordinance, which, however, permitted steam to escape within a certain distance after a stop. *Held* prejudicial error to instruct on the theory that the steam that frightened the team escaped under the conditions permitted by the ordinance, such theory having no sufficient support in the evidence.

TRIAL: Instructions—Conflict—Error. Conflicting instructions, one
2 correct, the other incorrect, ordinarily constitute prejudicial error. An instruction permitting the jury (1) to find negligence from the mere violation of an ordinance and (2) to negative such negligence by finding a certain fact, of which there was no sufficient evidence, is in prejudicial conflict with other instructions defining negligence generally as the failure to exercise reasonable care, the implication of negligence resulting from the violation of a law not depending on the exercise of care.

**TRIAL: Verdict—Ultimate Facts on Which Based—Affidavits of
3 Jurors—Incompetency.** Affidavits of jurors cannot be received to show the ultimate facts upon which a verdict was based. Conflicting instructions having been given on the subject of negligence, the

contention of the prevailing party that the affidavit of jurors on file showed that the verdict was based on the contributory negligence of the injured party, and therefore the conflicting instructions were without prejudice, was rejected because of the incompetency of such affidavits.

Appeal from Fayette District Court.—HON. A. N. HOBSON, Judge.

TUESDAY, DECEMBER 15, 1914.

REHEARING DENIED MONDAY, OCTOBER 4, 1915.

ACTION for damages for personal injury alleged to have been caused by the negligence of the defendant. From a verdict against plaintiff, he appeals.—*Reversed.*

Wade, Dutcher & Davis, for appellant.

F. W. Sargent, Robert J. Bannister and J. H. Johnson, for appellee.

WITHROW, J.—I. Plaintiff's cause of action is based upon the claim that his team was frightened by the negligent operation of a locomotive and train of the defendant, at a time when he was in the yards of defendant for the purpose of getting coal from a car which he had ordered, and that, by reason of his team becoming frightened, it ran away, causing personal injury to the plaintiff. The acts of negligence charged are, among others, that the tracks were within the city of Oelwein, and that there was an ordinance of that city which required the bell of the locomotive to be rung constantly while an engine was in motion, and prohibiting the engineer from allowing the escape of steam from the cylinder cocks while running within the city, and that, in violation of such ordinance, the bell was not rung and steam was permitted to escape, frightening plaintiff's team. Other acts of negligence charged are not material to this inquiry. There was a verdict for the defendant, and the plaintiff appeals.

1. TRIAL: instructions: unsupported theory: negligence.

II. An ordinance of the city of Oelwein, enacted for the purpose of controlling the operation of trains within the city, and providing punishment for its violation, among other things, required that:

“No engineer, fireman, or person in charge of any locomotive engine shall cause or allow the cylinder cock or cocks of said engine to be opened so as to permit steam to escape therefrom while running through the city; provided, however, that when such engine shall be standing at any point within the city, then for three revolutions of the driving wheels after being put in motion the said cocks may be opened for the purpose of allowing condensed steam to escape.”

It was the claim of the defendant on the trial and in this appeal that the escaping steam, of which complaint is made as an act of negligence, occurred only after a start of the locomotive from a stop, and within three revolutions of the driving wheels.

The trial court instructed the jury that it was negligence “to permit steam to escape from the cylinder cocks while running through the city, unless it appeared from the evidence that the engine had been standing at any point within the city, when it would be lawful for the stop cocks to be opened in starting for three revolutions of the drive wheels, and that the burden of proof was upon the plaintiff to show that the escape of steam was unlawful”. We have with much care gone over the evidence on this point; and while it tends to show that there were two or three stops of the locomotive in the yards while doing the train work, there is, to our minds, an absence of proof that any one of the stops was at such place and within such distance of appellant’s team that in starting, and within the permitted number of revolutions of the drive wheel, the condition or act resulted which is claimed to have caused the fright. Upon this question, the appellee in its argument states: “It is manifest, if the en-

gine was on the house track, there is no showing but what it was within sixty feet of some stop. In any event the movements and starts and stops of the engine were not so definitely located that a court as a matter of law would have had the right to submit the ordinance with the proviso eliminated." The state of facts to which we have referred, as well as the argument of counsel for appellee, reach directly to the assignment of error as to instruction No. 10, the relevant part of which we have quoted above, the answer being that there was no evidence upon which the quoted part of the instruction could be based.

The ordinance was pleaded by the plaintiff, and its violation in the respect charged was relied upon as one of the acts of negligence, it being averred that "the exact distance that said engine was run with the cylinder cocks
2. TRIAL: in-
structions: opened and escaping steam cannot be defi-
conflict: error. nitely stated". The negligence charged was not alone in permitting the steam to escape, but in permitting it at such time and under such circumstances as the appellee had not the right to do under the ordinance. No question is raised as to the correctness of the instruction of the trial court upon the burden of proof in proving the conditions which, under the ordinance, amount to a permission. The contention is that, as there was no evidence to support that issue, it was error to submit it to the jury. On the part of the appellee, it is claimed that in stating the grounds of negligence charged, there was included that, in general terms, of permitting steam to escape from the engine in passing down the sidetrack, and that by so submitting the question, no prejudice resulted to the appellee in also stating to the jury that of which complaint is made. This perhaps would be true, were it not for the fact that in other instructions the trial court defined negligence in general terms, and in instruction No. 11 stated as follows:

"It was the duty of the defendant company to use reasonable care in operating its train and engine at the time and

place in question for the safety of persons having business in its yards. If the defendant's employes exercised such care, then the defendant was not negligent; but if it did not exercise such care, then the defendant was negligent."

Instruction No. 13, stating the converse of that proposition was:

"You are instructed that the defendant company had the right to use its tracks and yard at Oelwein at the time of the accident in question in this case, and to occupy the same with its cars and engines and that it had the right to move its train and engine on and along the house track in the said yards at said time and place, and if you find from the evidence that reasonable care for the safety of those in and about the said tracks was used in the operating of said train and engine, then your verdict must be for the defendant."

The ordinance having been introduced in evidence and its terms made the basis of an instruction, in applying to the case instructions Nos. 11 and 13 in their statement of the rule as to reasonable care, there was the omission to state, as qualifying them, the rule as to negligence which the law implies as resulting from violating the ordinance. This was not dependent upon the exercise of ordinary care, or common prudence, but upon the observation of a duty fixed by the law of the city. Read together, we think that the instructions were conflicting, arising from giving instruction No. 10 as a ground of negligence, it being without support in the evidence. This constituted prejudicial error. *Quinn v. C. R. I. & P. Ry.*, 107 Iowa 710; *Kerr v. Topping*, 109 Iowa 150.

III. The plaintiff filed in the lower court, after verdict, a motion for a new trial and an amendment, based upon the grounds of newly discovered evidence and errors committed upon the trial, supporting which were the affidavits of three of the jurors who had served in the trial of the case. The motion was overruled, and error is predicated upon that ruling. That part of the motion which was aided by the

8. TRIAL: verdict: ultimate facts on which based: affidavits of jurors: incompetency.

affidavits of the jurors stated that they were filed "to support the fact that the court failed to instruct on the question of negligence of leaving the team stand while plaintiff was loading for a moment".

The affidavits were identical in form, each stating that "the general discussion was advanced (in the jury room) that plaintiff must be guilty of negligence such as to preclude his recovery by reason of leaving his team untied while he assisted another man," and that on that theory, they yielded their previous opinions and concurred in a verdict for the defendant; that prior to such, eight of the jurors had voted in favor of a verdict for plaintiff, and after that discussion, they yielded. Counsel for appellee urges that these affidavits filed by plaintiff, which were not objected to, affirmatively show that the finding for the defendant was because of plaintiff's contributory negligence, and therefore, under the instructions upon the question of negligence, there could have been no prejudicial error. We do not understand from the record that the affidavits were presented for the purpose of impeaching the verdict. Such, under well-settled rules, could not be done. *Porter v. Whitlock*, 142 Iowa 66; *McMahon v. Iowa Ice Co.*, 137 Iowa 368, 371; *Lloyd v. McClure*, 2 G. Gr. 139. Nor were they offered for the purpose of sustaining the verdict, as sometimes may be done. *Clark v. Van Vleck*, 135 Iowa, 194, 200; *Lloyd v. McClure*, *supra*. Whatever may have been the effect of the affidavits, they were for the stated purpose of showing a failure to instruct particularly as to a certain branch of the case; and even though they went to the extent of showing the considerations which governed some of the jurors in reaching their verdict, we are not disposed to accept them as properly showing more than they were offered to prove. They could not be held as offered to sustain the verdict, for it was sought to be set aside. If offered to contradict or impeach it, saying nothing of their incompetency for that purpose, they tended to show the ultimate finding upon which it was based, but did not and could not in that way establish it.

The error which we have noted is not cured by this late record.

As our conclusion requires another trial, it is unnecessary to further consider the motion presented on that ground.—*Reversed.*

LADD, C. J., DEEMER and GAYNOR, JJ., concur.

R. S. CRAWFORD, Administrator, Appellee, v. B. W. McELHINNEY et al., Appellants.

NEGLIGENCE: Automobile Accident—Evidence. Evidence reviewed
1 and held to support a finding that defendant was negligent in the handling of an automobile in a crowded public street.

NEGLIGENCE: Automobile Accident—Wife as Employee of Husband—Negligence of Wife—Liability of Husband. A wife engaged in the transaction of the business of the husband or the business of both of them, though only for their mutual pleasure, is the agent and employee of the husband, with consequent liability of the husband for the negligence of the wife. So held in an automobile accident.
2

PRINCIPLE APPLIED: A husband, two months before the accident in question, bought an automobile for the use and pleasure of both himself and his wife. He never had any driver but his wife. She used the machine on such trips as she cared to take. He accompanied her when he cared to do so and often when she requested him to do so. He invited guests to accompany them. Evidently he paid the expense of the trips. On the occasion in question, he was present at the suggestion of the wife on a sight-seeing trip to a fair and permitted the wife to operate the car. She ran the car over deceased. *Held*, the wife was the agent and employee of the husband, with consequent liability on his part for her negligence.

MUNICIPAL CORPORATIONS: Congested Street Crossings—Right to Use—Duty to Choose New Route—Negligence. There is
3, 5 no arbitrary right to use at any and all times and under any and all circumstances all parts of a public street. Circumstances, and ordinary prudence in view thereof, are an ever-present limitation on the right. Circumstances often demand a stop and even a turning aside and the choosing of another route. So

held where defendant drove an automobile across a congested street crossing.

NEGLIGENCE: "Common Enterprise"—Husband and Wife. A husband and wife, engaged in a pleasure trip with invited guests and with an automobile owned by the husband and under his control but driven by the wife, are pursuing a "common enterprise."

PRINCIPLE APPLIED: (See No. 2.)

MUNICIPAL CORPORATIONS: Congested Street Crossings—Right 3, 5 to Use—Duty to Choose New Route—Negligence.

NEGLIGENCE: When Negligence Will Be Imputed. The negligence of the driver of a conveyance will be imputed to one riding with the driver (a) when both parties are engaged in a common enterprise, and (b) where the driver is engaged in an enterprise for the use and benefit of the other party or in the employ or under the control and direction of such other party, whether such other party exercises his power of control or not.

VERDICT: Death of Child—\$3,300. Verdict of \$3,300 for death of an eight-year-old child of ordinary ability sustained.

Appeal from Wright District Court.—HON. C. G. LEE, Judge.

MONDAY, OCTOBER 4, 1915.

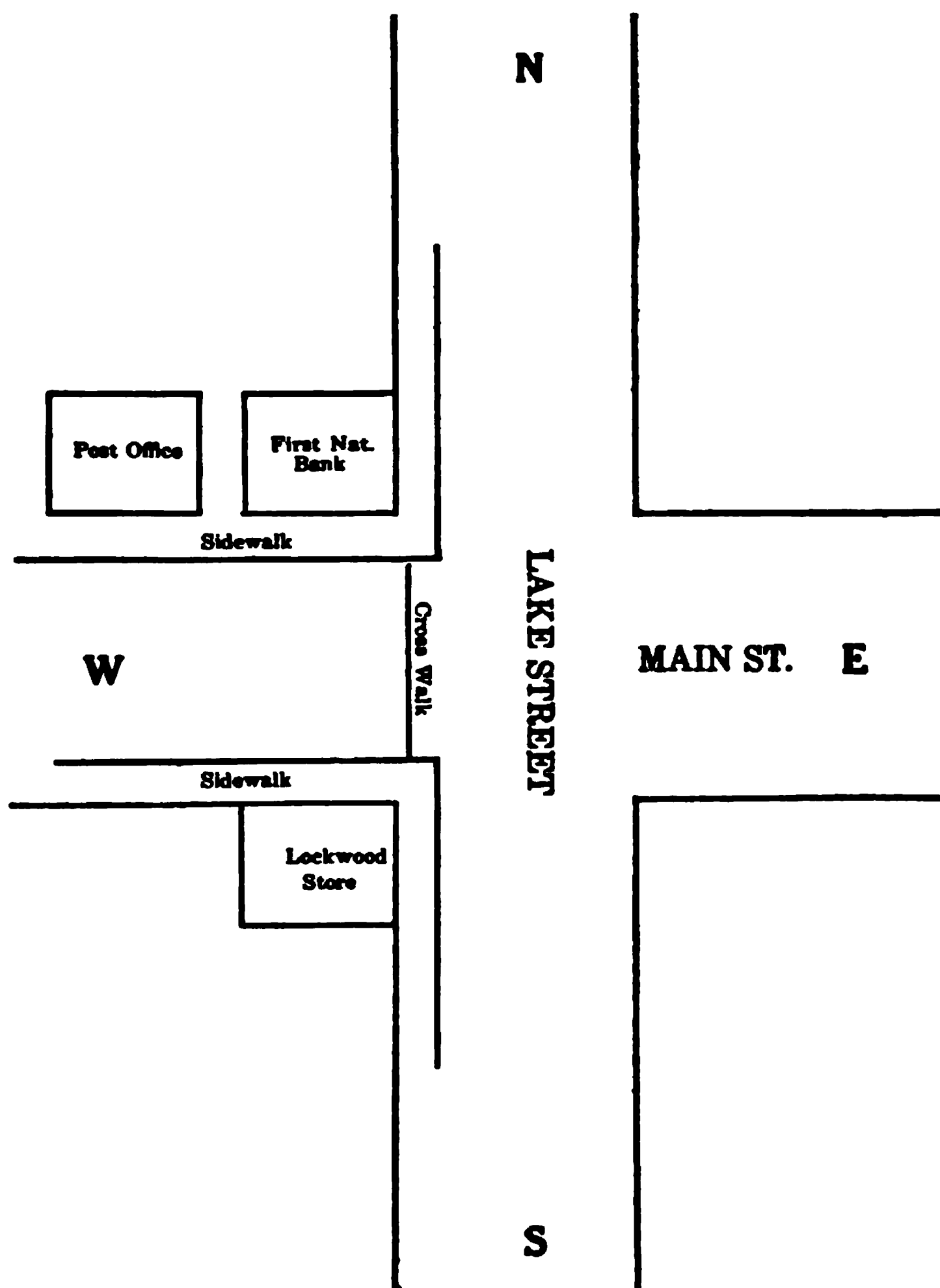
THIS action was brought by the administrator of the estate of Eicel June Crawford, a minor about eight years of age, to recover damages under the allegations that her death was caused by her being struck, while walking on a street crossing in Clarion, Iowa, by the automobile of the defendant, B. W. McElhinney, while it was being driven by his wife by his authority, direction, and with his consent. There was a trial to a jury which resulted in a verdict in favor of plaintiff and against both defendants for \$4,000. The verdict was reduced by the trial court to \$3,300 and judgment therefor entered. Defendants appeal.—*Affirmed.*

Nagle & Nagle and Birdsall & Birdsall, for appellants.

Peterson, McGrath & Archerd and Kelleher & O'Connor, for appellee.

PRESTON, J.—The collision happened September 5, 1912, at about five o'clock in the afternoon, while plaintiff's intestate was proceeding northward across Main Street. The line being traversed is marked "cross walk" between the First National Bank and the Lockwood store, on the plat here set out.

PLAT EXHIBIT "A."



The defendants in the automobile came from the north, and the accident occurred while the automobile was turning the corner from Lake Street into Main Street, going westward. Deceased died a few hours after being hurt. It is alleged that on said date a county fair was being held at Clarion, and in connection therewith an amusement program, largely advertised, was being given, all of which brought a large assembly of people; that the traveled portion of the streets was congested with horses, buggies, and automobiles, and the sidewalks and street crossings with pedestrians, among whom were a large number of children; that, at the time of the accident, there was in operation on Main Street an amusement game known as "Nigger Dip," which had attracted a large collection of people in and about the street and the crossing at the intersection of Main and Lake Streets and along the line of the west side of Lake Street. The grounds of negligence alleged are:

"(1) In failing to have said automobile under sufficient control to stop the same before driving the car against, upon and over said child, in that the defendants failed and neglected to disconnect the engine and apply the brakes sufficiently to immediately stop said car;

"(2) In failing to stop said car before driving the same against, upon and over said child;

"(3) In failing to see and observe the peril of said child upon said crossing, and in driving the car against, upon and over said child notwithstanding her obvious position, surrounding conditions, and peril at the time of the accident;

"(4) In failing to stop said car after driving against and upon said child before she was dragged and crushed under the wheels;

"(5) In failing to drive and operate said car at the time and place of the accident at such speed and under such control as to enable the driver to immediately stop the same in case of peril or danger to foot passengers;

“(6) In failing to operate the machinery providing for the immediate stopping of said car at the time and place of the accident in a careful and skilful manner;

“(7) In driving said car at the time and place of the accident at such rate of speed and in such a manner as to prevent its being immediately stopped at the control of the driver;

“(8) In driving said car at the time and place of the accident through a crowded street and over a crossing congested with standing people, near by an amusement game in operation, where only a small opening was left through which it was possible to drive, under such power and rate of speed as prevented the immediate stopping of said car in case of peril or danger to foot passengers therefrom;

“(9) In attempting to turn the car at the intersection of Lake and Main Streets and drive over said crossing at the time and place of the accident, when, before turning said car at right angles from the direction it was going, it was obvious to see the conditions existing at, upon and about said crossing; that an amusement game known as ‘Nigger Dip’ was in operation near thereto in the street immediately west of said crossing, that said crossing and street at the place of the accident was congested with standing persons watching said amusement game, and with foot passengers returning from the county fair passing over said crossing, that the congested and crowded condition was such that at said time and place standing persons and foot passengers, among whom were many children, were constantly upon said crossing and all portions thereof, and when it was known to the defendants that there were other crossings and streets not so congested that might have been used by them in driving to their destination.”

The defendants filed their separate answers, denying generally all the allegations in the petition.

At the close of plaintiff's evidence and again at the close

of all the evidence, a motion was made to direct a verdict for Mrs. McElhinney on the ground that the evidence fails to

1. NEGLIGENCE: show that she was negligent in the operation
automobile of the automobile, and because the evidence
accident: evi- shows that the accident was caused by the
dence.

deceased carelessly, suddenly and negligently turning and walking in front of the moving car so that defendant was unable to stop the car in time to avoid the accident. A similar motion was made in behalf of the defendant B. W. McElhinney, on the ground that he is not liable for the torts of his wife. The rulings on these matters, among others, are assigned as error.

We shall take up first the question as to whether there was evidence justifying the submission of the case to the jury on the question of the negligence of Mrs. McElhinney. Evidence was introduced on behalf of defendants from which the jury could have found that, at the time of the accident, Mrs. McElhinney was driving the car slowly, not more than four or five miles an hour; that as she approached the sidewalk she saw a boy and girl standing on the cross walk to the left of the car; that she blew her horn and the boy passed along the walk to the north, but the deceased remained standing on the walk and turned towards the south, probably attracted by the amusement on the south side of the street; that there was room for the car to pass over the crossing if the girl had remained where she was, but that, just as the car got on the crossing, she turned and started north and walked in front of the car; that at that instant Mrs. McElhinney disengaged the clutch and applied the brakes, but was not able to stop the car in time to avoid the accident; that the little girl was knocked down and passed between the front wheels and was caught by the left hind wheel, which was sliding, and which pushed her about two feet before the car was stopped; that to disengage the clutch and apply the brakes is all that can be done to stop a car; that the car was properly equipped with brakes, which were in good condition at the time of the accident.

Such was the general nature of the evidence introduced by defendants and, had the jury found for the defendants, such a finding would have had sufficient support. But there was other evidence in the case, from which the jury could have found that the facts were not as claimed by defendants. We shall not attempt to set out the evidence in detail, but enough to show that there was a conflict in the evidence for the determination of the jury. Plaintiff's evidence tended to show, and the jury could have so found, that the crossing on which deceased was walking at the time she was struck is a cement crossing six feet in width, and elevated above the surface of the ground, east of it, from two to three inches; that the crossing has a slightly rounding surface; that Main Street, west from the crossing, has a fall of two feet and one inch in a distance of twenty-one feet; that the streets were not paved and the street and dirt were dry; that the intersection of Main and Lake Streets is in the central and thickly settled portion of the town. While there is a conflict in the evidence on the question, there is evidence of several witnesses that, at this intersection and on both sides of the crossing, including the crossing itself, several people were congregated and a large number of people were assembled in that vicinity. One witness says that there were as many as a dozen or fifteen people on the crossing itself; some of defendants' witnesses testify that the sidewalks in the vicinity were thickly covered with people; another witness says, "The street was practically full from Lockwood's up half of the way—standing on the sidewalk and to the west of the sidewalk; that street was full;" there were many children among the people; witnesses say that there was some noise on the south side of the street, some confusion there; "hollering and laughing was going on among the crowd." Under these circumstances, the car in question came from the north and turned west across the cement crossing, striking deceased where she was on the cement walk. There was evidence that the car, in passing over the cement crossing, was a little to

the north of the center of the street at the time it struck deceased. The evidence is in conflict as to whether deceased hesitated and stopped before she was struck. Some witnesses say that she did so, while others say "She did not stop and stand still; she was coming right along." Some of the witnesses say that her face was turned a little to the west, others that she seemed to be turning and looking to the southwest. Mr. McElhinney states that he thinks her face was turned to the north, but says he does not remember that she turned her face toward the car at any time before the accident. Mrs. McElhinney says, "I knew and felt that her attention was attracted to something else as I saw her standing there. She moved about two feet and was struck." Witnesses say that deceased did not notice the car until it got upon her and then it was too late. Just before her death, deceased said she did not see the car before it struck her. The evidence is in conflict as to whether another car preceded defendants' car over this crossing. There was evidence that the driver of the car could readily see deceased on the crossing for a distance of twenty or twenty-five feet, and could have seen, and in fact did see, deceased on the crossing and knew of her position; that there was nothing between the car and the little girl to obstruct the line of vision of the driver. The defendant B. W. McElhinney testifies that before she was struck, the little girl hesitated just a mere second and took a couple of steps after she stopped, before the car hit her; and that when she stopped, she was south of the line of the car two or three feet, and that when she stopped, the car was east of her from twenty to twenty-two feet. Several witnesses say that deceased was struck and knocked down by the front end of the car, but in such a way as not to be struck by either of the front wheels. There was evidence from which the jury could have found that the car, from the time it struck the little girl, traveled forty feet or more from the point of collision, though there is a conflict at this point. Some of defendants' witnesses say that when the car was finally stopped, the rear end of it was

from twelve to fourteen feet from the west line of the crossing. The car was twelve to thirteen feet long, and this would show that the car traveled a distance of twenty-three to twenty-four feet. Plaintiff's witnesses make this distance more. Some of them say the rear of the car was thirty feet from the west line of the crossing and this, added to the length of the car, would make about forty-three feet. So that if the driver of the car could and did see deceased on the crossing when twenty to twenty-five feet east of the crossing, the car would have traveled about sixty-eight feet after the driver saw and knew, or should have known, of the position of peril of the little girl. The evidence was such that the jury could have found that the car was being driven at an excessive rate of speed under the circumstances; one witness states that the car was running eight or ten miles an hour, another five miles; defendants' witnesses say about four miles. Even if the rate of speed should not be regarded as excessive, the jury could have found from the evidence that, after the position of the little girl was known or should have been known by Mrs. McElhinney, she failed to exercise proper care to stop or divert the course of the car. As before stated, there was evidence that the car traveled about forty feet after the girl was knocked down before it was stopped, and there was evidence that the rear wheel of the car remained in contact with the body of the child and pushed her along in front of the wheel eight or ten feet; other witnesses say that she was pushed two or three feet. There was evidence that, going at the rate of eight or ten miles an hour, the car could have been stopped at this crossing, and, under the circumstances, within a distance of four feet; if going at five miles an hour, it would not have gone more than two feet, and at four miles, even less; witnesses give their estimate as to the length of time it would take to release the clutch and make an application of the brakes, some of the witnesses claiming that it would take four or five seconds to make an application of the brakes,

while plaintiff contends that it could be done instantly, had the driver had her foot on the brake; and there is evidence that it could be done in a fraction of a second; as one witness puts it: "If you are ready you can do it a good deal quicker than five seconds, but if you are not ready you can't." Under the circumstances here shown, the driver should have been ready. Evidence for defendants is that the wheels were locked and sliding, but there is evidence that an obstruction in front of one of the wheels would cause the wheels to slide even though the opposite wheel is not sliding and where the brake has not been applied. An eyewitness says that he knows the wheels didn't slide all the distance, but that in his opinion they slid four or five feet. There is evidence that, with a car running five miles an hour and with such an application of the brakes made as to lock the wheels, they would not go three feet if the clutch is off; that such circumstances would indicate that the clutch had not been disengaged and that the engine was fighting the brake. Plaintiff contends that though there is evidence that the driver pressed her foot on the clutch so as to disengage the engine, the fact that the car moved the distance it did, at the rate of speed, if the brakes were on, indicates that the driver had not disengaged the engine. Mrs. McElhinney admits that she did not have her foot on the brake just before deceased was knocked down; for she says: "I had one foot on the clutch, and the other foot on the accelerator, but I was not pressing it." She says she did not press her foot on the brake until, as she puts it, the child turned in front of the car.

Defendants' witness Eyler states that he was standing on the edge of the sidewalk south of the First National Bank; that he saw the car strike the child and that it was probably eight or ten feet from where he stood to the car as it crossed over the crossing; that, as the car struck the girl, he jumped for the car, reached its side, and asked Mrs. McElhinney if she could stop the car. He says: "I grabbed the car in my

excitement and desperation. I grabbed the car myself." All this occurred after the child was struck and before the car stopped. He says that the car had run about its length from the time it struck the girl until he asked Mrs. McElhinney if she could stop it. He says further that the child was seven or eight feet west of the crossing and the rear wheel first caught her and that the wheel dragged her eighteen inches or two feet. Under the evidence, if the car had been stopped within the distance in which the evidence shows it could have been stopped, the child would have been saved; at least it was a question for the jury. From these circumstances, it was for the jury to say whether Mrs. McElhinney had the car under proper control. Other circumstances may properly be noticed in this connection. Mrs. McElhinney says that the child moved only a couple of feet before she came in front of the car, and there is evidence for plaintiff that when the child was struck she was north of the center of the car, and the jury might well have found that, while the child was upon the crossing, she was immediately in front of the car, or so near the line of its passage as to make her position one of peril. As before stated, Mrs. McElhinney says she knew and felt that the child's attention was attracted to something else while standing there. Plaintiff contends that defendant was negligent in even approaching the crossing, with deceased standing on the crossing with her attention diverted, and the jury might well have so found. As stated, there is a conflict in the evidence as to the exact position of the little girl and the direction in which she was looking, and as to whether she had stopped or was coming right along.

We may have set out the evidence more fully than necessary, but we have not given all the details of the evidence for either side. Enough has been set out to show that there was a jury question as to the alleged negligence of Mrs. McElhinney.

2. It is contended for defendant B. W. McElhinney that, under the statute, Sec. 3156, Code, he is not liable for the

torts of his wife except in cases where he would be jointly liable with her if the marriage relation did not exist; and that the evidence fails to show that the relation of master and servant existed between the defendants; and that, therefore, the husband is not liable for the negligence of his wife, if she was negligent. He contends that the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some negligence or wrong at the time, and in respect to the very transaction out of which the injury arose. He claims that at the time in question he was merely the guest of his wife and made the trip only upon her invitation; but we are of opinion that, under the evidence, it was a question for the jury, if, indeed, the evidence is not undisputed that Mrs. McElhinney was the servant and agent of her husband, and that they were engaged in a common enterprise. Mr. McElhinney owned the car and had owned it since July, 1912; he testifies that, since he became the owner of the car, he has had no other driver than his wife. On cross-examination, he says that this trip was "purely a pleasure trip for me and her; she could go on such trips as she wanted to make, when I was not along, and whenever I wanted to go or she wanted me to go with her, we would go together, and she would do the driving in both instances. I went on this trip at her suggestion. It was done upon my own volition and upon her suggestion that she would like to have me with her. I looked at the Fair myself and acted kind of independently after I got to the Fair grounds." Mrs. McElhinney says: "Mr. McElhinney never operated the car. I have done all the driving of our car." It appears from the evidence that Mr. McElhinney was so far in charge of the trip in question as to personally invite the guests who accompanied them. Mr. Palmer testifies: "Mr. McElhinney invited me and my wife to ride over with them." Mr. Palmer and his wife were in

2. NEGLIGENCE:
automobile ac-
cident: wife
as employee
of husband:
negligence of
wife: liability
of husband.

the car with defendants at the time of the accident. Mr. McElhinney does not claim that he did not bear the expense of the trip; he was present at the time and permitted his wife to operate the car on this trip. The mere fact that he transacted no business does not argue that he was not engaged with his wife on the trip in question for their mutual pleasure. The case is not like *Reynolds v. Buck*, 127 Iowa 601, *Hartley v. Miller*, (Mich.) 130 N. W. 336, where the son or relative of the owner of a car is engaged in his own business and pleasure and not in any manner connected with the owner's employment or business, and without the knowledge or consent of the owner, and when the owner is not present (see also *Symington v. Sipes*, (Md.) 47 L. R. A. (N. S.) 662 and note), or where the borrower of a car is using it in his own business exclusively.

It is not contended by plaintiff that the husband is responsible for the negligence of his wife because of the marriage relation, but because of the nature of the work she was doing, and because the trip was being taken for their mutual pleasure, in his car. It is not contended by defendant that the wife may not be an employee or agent of her husband. It is doubtless true that the mere existence of the relation of husband and wife will not create the relation of master and servant, or agent on the part of the wife, so as to render the husband liable for negligence in operating his automobile; but here there are other circumstances. It is further shown that the wife acted as the chauffeur of the car bought by the husband for the use of both of them, and in the particular instance it was being used for the mutual pleasure of both. In the instant case, if defendants were engaged in a common enterprise, or if Mrs. McElhinney was the employee and agent of her husband at the time in the use of the car by his authority, for some purpose for which the car was bought and kept by him, they would both be liable for her negligence in such use. In *McNeal v. McKain*, (Okla.) 41 L. R. A. (N. S.) 775, and note, the cases are collected as to the lia-

bility of the owner of an automobile used by a member of his family. As to third persons, a minor child may become, by particular arrangement, the servant of the father, and this without agreement for compensation. *Parker v. Wilson*, (Ala.) 60 So. 150. The wife may be the agent or employee of her husband. The evidence of defendant is such as to show that at the time in question his wife was in his employ, in the sense that she was engaged in the transaction of his business or the business of both. Apparently he bought the car for the pleasure of his family, which included both his wife and himself. He had no other driver. We think there was no error in overruling the motion of defendant B. W. McElhinney for a directed verdict on this ground. As bearing upon this question, see the following cases: *Ploetz v. Holt*, (Minn.) 144 N. W. 745; *Carpenter v. Auto Co.*, 159 Iowa 52; *Chamberlain v. Brown*, 141 Iowa 540; *Kayser v. Van Nest*, (Minn.) 146 N. W. 1091; *Stowe v. Morris*, (Ky.) 144 S. W. 52; *Daily v. Maxwell*, (Mo.) 133 S. W. 351; *Smith v. Jordan*, (Mass.) 97 N. E. 761; 21 Cyc. 1237; 28 Cyc. 38; 2 R. C. L. 1198-1199.

3. The next assignment of error is that the court erred in refusing to withdraw from the jury each of the assignments of negligence charged in paragraphs 1, 3 and 8 of the petition, on the ground that there was no evidence to sustain such grounds of negligence. We have set out enough of the testimony to show that there was evidence sufficient to submit these propositions to the jury.

4. The refusal of the instructions offered by defendant and some of the instructions given by the court are criticized. Instruction number 8, requested by defendant, relates to the care required of deceased and of the driver of the car. Instruction number 12, given by the court, and of which no complaint is made, is a literal copy of offered instruction 8 except one clause, and that is at the point where the court said to the jury, "if they found according to defendants' theory of the evidence that

8. MUNICIPAL
CORPORATIONS:
congested
street cross-
ings: right to
use: duty to
choose new
route: negli-
gence.

defendant observed the child in that attitude and that 'there was then an opportunity for her (defendant) to pass over the crossing with apparent safety with the automobile.' '' For the quoted words, the court substituted the following: "acting as a reasonably prudent person under the circumstances, she believed she could pass over the crossing in safety with the automobile." We have attempted to give the sense of the alteration without setting out the two long instructions in full. We think the modification is correct. After noticing the position of the child, the defendant would not be justified in proceeding unless a reasonably prudent person would have proceeded under the same circumstances.

5. Instructions 3, 5 and 6, offered by defendants, relate to the liability of B. W. McElhinney for the negligence of his wife. We think that, under the undisputed evidence and the admissions of defendants, they were engaged in a common enterprise, and that Mrs. McElhinney was the agent and employee of her husband. But the court submitted the question to the jury. We think the matter referred to in the requested instructions just mentioned is covered by instructions 8 and 9 given by the court, which are in harmony with the views we have expressed in a prior paragraph of this opinion, and are as follows:

4. NEGLIGENCE:
"common en-
terprise": hus-
band and wife.

VIII.

In this case it appears from the uncontradicted evidence that the automobile in question was being handled and operated by the defendant, Mrs. B. W. McElhinney. You cannot find the defendant B. W. McElhinney liable under the evidence in this case without finding that his co-defendant was negligent in some of the respects charged in plaintiff's petition, and that the plaintiff has established, by a preponderance of the evidence, the other material allegations of his petition against the said Mrs. B. W. McElhinney; but if you find the said defendant, Mrs. B. W. McElhinney, liable

in this case and you further find, by a preponderance of the evidence, that the said defendants, at the time of the matters complained of, were engaged in a common enterprise, or that the automobile in which the defendants were riding was under the control of the defendant B. W. McElhinney, then you will find that the negligence, if any, of Mrs. B. W. McElhinney was the negligence of the defendant B. W. McElhinney, and in such case, if either defendant is liable, both will be. If, however, the defendants were not engaged in a common enterprise, or the defendant B. W. McElhinney did not have any control over the use of the car in question, but was a guest therein, then the negligence of defendant Mrs. B. W. McElhinney, if any, could not be imputed to him and he would not in any event be liable in this case.

IX.

In determining whether or not the defendant Mrs. B. W. McElhinney, in driving the car in question, was under the control or in the service of the defendant B. W. McElhinney, at the time of the injury complained of, you will consider that the relation of master and servant cannot be predicated or arrived at alone from the relation of husband and wife; nor can the same be presumed merely from the fact that he was the owner of the automobile which she was driving at the time. The fact that the defendants were husband and wife and that he was accompanying her in the automobile and was the owner thereof will not alone justify you in finding that she was under his control at the time of the alleged injury; but such facts are proper to be considered by you in connection with all the other facts shown in evidence in determining whether or not the defendants were, at the time of the accident, pursuing a common purpose, or whether or not the defendant B. W. McElhinney did participate in the control of the use of the car at such time.

The criticism of instruction number 8 above quoted is the use of the words therein, "that the said defendants, at the time of the matters complained of, were engaged in a common enterprise." It is said that the word "enterprise" is a broad one, and ordinarily applies to a business transaction; but what has been said in a prior division of the opinion on this subject disposes of this criticism. The criticism of the words "whether or not the defendants were at the time of the accident pursuing a common purpose" is answered by what we have just said in regard to similar language in number 8.

6. Instruction number 6, given by the court, is as follows:

"You are instructed that the rights of travelers upon the streets or highways are mutual and co-ordinate; each has a right of passage; and in this case you are instructed that the defendant could rightfully use the street and pass over the street crossing where the accident occurred with the automobile, notwithstanding there was a number of people congregated on the street at the end of the crossing and notwithstanding people were crossing the street upon the street crossing, provided that in so doing the defendant exercised due care and caution in the management of the automobile. The defendant was not obliged to turn around and seek another crossing or street to pursue her journey if, in the exercise of due care on her part, she could use this crossing without injury to others. But if it was imprudent or dangerous to use said crossing at said time, then ordinary care would require defendant to stop the car or seek another crossing."

5. MUNICIPAL
CORPORATIONS:
congested
street cross-
ings: right to
use: duty to
choose new
route: negli-
gence.

Defendants' requested instruction number 7 is in the same language as number 6, above set out, except that the court added the last three lines, or last sentence, as above set out; of this addition defendant complains. The thought included in the addition is a correct view of the rule of law

involved. *West v. Ward*, 77 Iowa 323-325. The instruction in the form requested was partial to some extent to the defendant, and by the addition, the court simply states the reverse side of the argument. This instruction, with the addition, should be considered in connection with other portions of the court's charge, including paragraphs 7 and 2. In 7, the jury were told that the happening of the accident did not authorize them to find negligence, and in instruction 2, the jury were informed as to what must be established in order that plaintiff might recover. The instruction criticized does not relate to the issue of negligence to be determined by the jury. In other portions of the charge, the jury were instructed that they could find the defendants negligent only in case they found plaintiff had proved one or more of the three charges of negligence included in the petition, and the

6. NEGLIGENCE: use by the defendants of this crossing. In the
when negli- other instructions, the defendants' failure to
gence will be
imputed. use some other street is not embodied within
these charges of negligence. The defendants complain of
instruction number 1, requested by plaintiffs and given. That
part of the instruction criticized is copied literally from the
case of *Carpenter v. Campbell Auto Co.*, 159 Iowa 52, 62,
where we said:

"In every case in which it is held that the negligence of the driver cannot be imputed to the party riding with him, an exception is always made to the effect that where they are engaged in a common enterprise, or where the driver is in an enterprise of any kind for the use and benefit of the party charged, in his employ, or under his control, or where the instrumentality used is under the control and direction and owned by the party charged, and where he has a right to control and direct it, whether he exercises that right or not, he is held for the negligence of the driver. Under the record made in this cause, the court rightly overruled defendant's motion for an instructed verdict."

The case of *Hartley v. Miller*, (Mich.) 130 N. W. 336, relied upon by appellant, is distinguished in the *Carpenter Case*.

7. Lastly, it is urged by defendants that the verdict as reduced by the trial court is excessive, and they cite *Farrell v. Railway Co.*, 123 Iowa 690. In that case, a verdict for \$3,000 for the death of a child eight years of age was held not to be excessive. The testimony shows that, in this case, the deceased was about eight years of age and that she was an ordinary child, possessed of ordinary ability for her age. The expectancy of one of that age is forty-nine years. There can be no fixed rule in such cases, and in view of the fact that the trial court reduced the verdict to an amount so near the amount which was allowed to stand in the *Farrell Case*, we do not feel justified in a further reduction.

7. VERDICTS :
death of
child : \$3,300.

The case appears to have been carefully and ably tried by both the trial court and counsel for the parties. We discover no prejudicial error, and the judgment is therefore—*Affirmed*.

DEEMER, C. J., WEAVER and EVANS, JJ., concur.

J. HOBBS, Appellee, v. ILLINOIS CENTRAL RAILROAD COMPANY et al., Appellants.

MASTER AND SERVANT: Exoneration of Servant Ipso Facto Exoneration of Master—Inconsistent Verdicts. If the employee who actually does a thing is free from liability therefor, his employer must also be free from liability. Stated in another way: If the master is responsible for the act in question *solely* under the doctrine of *respondeat superior*, then an exoneration of the servant, who actually did the act *ipso facto* exonerates the master.

PRINCIPLE APPLIED: Plaintiff was one of several shippers who left their stock train, boarded a passenger train, and insisted on riding thereon under the transportation furnished them as caretakers. As they refused to leave the train or secure tickets, the

conductor called two employees of the company who, as special policemen, were employed in guarding the property of the company, and the stockmen were compelled to leave the train. Plaintiff's action was against the company and both of said employees. He claimed (a) that the two employees had assaulted and severely injured him without cause, and (b) that the company had failed in its duty to protect him as a passenger. The jury returned a verdict in favor of both of the employees and against the company. *Held*, this verdict, *followed by judgment thereon*, likewise exonerated the company from all responsibility.

Appeal from Cherokee District Court.—HON. WILLIAM HUTCHINSON, Judge.

SATURDAY, APRIL 10, 1915.

REHEARING DENIED MONDAY, OCTOBER 4, 1915.

ACTION for damages consequent on an alleged unlawful ejection from defendant's train resulted in judgment against defendant, from which it appeals.—*Reversed*.

McCulla & McCulla and Healy, Burnquist & Thomas, for appellee.

Molyneaux & Maher and Helsell & Helsell, for appellants.

LADD, J.—The plaintiff and several others were shippers of live stock over defendant's road from Cherokee county to Chicago, Ill., December 17, 1911, and were accompanying

MASTER AND
SERVANT: ex-
oneration of
servant *ipso*
facto exoner-
ation of mas-
ter: inconsis-
tent verdicts.

the stock as caretakers on transportation furnished by defendant company. The caboose in which they rode was somewhat crowded and when they reached Ft. Dodge, at 3 o'clock A. M., they obtained a lunch and later boarded a passenger train which was about to leave for their destination. The conductor informed them that they must have tickets and that their transportation on the stock train would not be received, and that they should get off and get tickets. In the absence of any response, he said, "Must I

get an officer and put you off?" and then went out and returned with defendants Core and Gressley, whereupon the conductor directed them to put off the 11 or 12 stockmen, including plaintiff. One of them was assisted and with him all started for the exit. There was some parley about plaintiff's going back for his overcoat and, when he reached the platform, he backed from the car and was trying to put an overshoe on when, according to his story, Core put his hands on his shoulder and pushed him down the steps, he striking the brick walk with his shoulder and head, and they then pounded him with their billies and otherwise mistreated him. On the other hand, the evidence tended to show that plaintiff resisted at the door and that Core acted in self-defense. Core and Gressley had been sworn in as policemen by the police judge and given billies and stars by the chief of police, but were employed by the defendant company in guarding its property from 6 o'clock P. M. to 6 o'clock A. M. They had completed the watch and were in a shop on their way home when met by the conductor and the assistant train-master who, ignorant of their relation to the company and supposing them to be policemen, arranged with them to eject the plaintiff and others from the train, which they did under the direction of the conductor, as stated. It will be seen that the wrongs, if any, done to plaintiff were by the defendants Core and Gressley and the company is liable therefor, if at all, only (1) because of its being responsible as their superior as principal or master, they being agents or servants, or (2) because of a breach of its duty to protect passengers against the wrongs, if any, such as they committed. It may be conceded that, as a carrier of passengers, the company was required to exercise toward plaintiff the highest degree of care for his safety and protection (though it is doubtful whether he ever became a passenger), *Ray v. Chicago & N. W. R. Co.*, 163 Iowa 430; but if remiss therein, and there was a breach of this duty, it was in directing Core and Gressley to commit on him the wrongs complained of. These were the

only ones from which plaintiff claimed to have suffered, and if no wrongs were committed by them, then nothing remained for which the company could have been held responsible. The jury, however, returned a verdict for defendants Core and Gressley but against the company. The latter moved that judgment be entered in its favor because of the exoneration of the other defendants. The motion was overruled. Thereupon, the company moved for a new trial, and this motion was overruled and judgment entered on the verdict in favor of Core and Gressley and against the company. Counsel for the company contend that the exoneration of its co-defendants necessarily relieves it of all responsibility, and that there was error in assessing against it any damages whatever. It seems impossible to avoid this conclusion. The responsibility of the company was necessarily dependent upon the culpability of its co-defendants, who were the immediate actors. And yet in the same action by the same plaintiff for the same wrongs, they were adjudged not culpable and the company adjudged culpable, though it was without fault save as responsible for the acts of its co-defendants. The trial proceeded on the theory that it was essential, in order to recover, that the jury find Core and Gressley to have been employees or agents of the company. If they were such, then the company was only liable as their superior and not because of anything it did by or through any other. As said in *Doremus v. Root*, 23 Wash. 710, 715, (63 Pac. 572; 54 L. R. A. 649), "Joint tort feors are liable to the injured person (other than that he may have but one satisfaction) as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of actions are in no sense joint tort feors, nor does their liability to the plaintiff rest upon the same or like grounds. The act of an employee, even in legal intendment, is not the act of his employer unless the employer either previously directs the act to be done or subsequently ratifies

it. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondeat superior*—the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employee, and when the employer is compelled to answer in damages therefor, he can recover over against the employee."

The principle so clearly expressed has been approved by this court in *White v. International Text Book Co.*, 150 Iowa 27, followed in *Dunshee v. Standard Oil Co.*, 165 Iowa 625, and is sustained by the overwhelming weight of authority. *Portland Gold Mining Co. v. Stratton's Independence, Limited, et al.*, 158 Fed. 63 (16 L. R. A. (N. S.) 677); *Hill v. Bain*, 15 R. I. 75 (2 Am. St. 873); *City of Anderson v. Fleming*, 160 Ind. 597 (66 L. R. A. 119); *King v. Chase*, 15 N. H. 9 (41 Am. D. 675); *Gardner v. Southern Ry.*, (S. C.) 43 S. E. 816; *McGinnis v. Chicago, R. I. & P. Ry.*, 200 Mo. 347 (9 L. R. A. (N. S.) 880; 118 Am. St. 661); *Hayes v. Chicago Tel. Co.*, 218 Ill. 414 (2 L. R. A. (N. S.) 764); *Ferguson v. Truax*, 132 Wis. 478 (13 Am. & Eng. Ann. Cases 1092); *Muntz v. Algiers & G. St. Ry. Co.*, 116 La. 236 (40 So. 688); *Chicago, St. P. M. & O. Ry. v. McManigal*, 73 Neb. 580.

Where the real actor (who is none the less liable personally because acting for another) is not guilty, it necessarily follows that the party for whom he acted cannot be. In *Sparrow v. Bromage*, 83 Conn. 27 (27 L. R. A. (N. S.) 209), the verdict was against two tort feasons and it was set aside as against one and allowed to stand against the other, against whom the evidence was sufficient. The general rule is that where one has received an actionable injury at the hands of two or more persons acting in concert or acting

independently of each other, if their acts unite in causing a single injury, all of the wrongdoers are severally liable to the person injured for the full amount of damages occasioned thereby, and he may enforce claim therefor in an action against all of them jointly, or any one of them severally, or against any number of them less than the whole. While the wrong committed is the joint wrong of the several parties participating, it is, in contemplation of law, the several wrongs of each of them. Cooley on Torts (2d Ed.) p. 153. The jury may find against all or in favor of some and against others, and on this ground the ruling by which a new trial was granted to one and denied to another in the last cited case was approved. See *Young v. Gormley*, 119 Iowa 546. There is a wide distinction between the ordinary actions for tort, where all defendants participated in the wrongful act occasioning the injury, and actions like that before us, where one or more is liable because of having committed the act, and the other only by operation of law by virtue of its relation to its co-defendants and the injured person. Here the company is not liable as a joint wrongdoer, as it did nothing save through others, but because of its responsibility for the acts of its co-defendants.

In *Portland Gold Mining Co. v. Stratton's Independence*, *supra*, the authorities are reviewed by Van Devanter, J., and the conclusion reached that:

“It is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way is subject to recognized exceptions, one of which is that, in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not

have been bound by it had it been the other way. And we think it could not well be otherwise, for, when the plaintiff has litigated directly with the immediate actor the claim that he was culpable, and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible. To such a case the maxim, '*Interest rei publicae ut sit finis litium*,' may well be applied."

There are decisions to the contrary but the grounds on which they rest are not persuasive. See *Schumpert v. Southern R. Co.* (S. C.), 43 S. E. 813.

The theory of these cases seems to be that in some way the master is a joint tortfeasor, even though liable only because responsible for the act of the servant. In *Carson v. Southern R. Co.* (S. C.) 46 S. E. 525, the verdict was for the servants and against the railroad company, and it was urged that, as the servants who were the sole actors had been found to have been guilty of no negligence, there was none to charge the company with; but the court held that (a) the servants are not held responsible personally because such torts were committed in the master's service—"One may be taken and the other left,"—and (b) "We do not think that a verdict in favor of the servants turns the master loose thereby." In *Gulf, etc., Ry. Co. v. James*, 73 Tex. 12 (15 Am. St. 743), it was thought that the inconsistency involved in such a verdict alone would not warrant a new trial. The vital proposition that if the servants, as the real actors, are found to have been without fault, the master could not be held responsible for a wrong found not to have been perpetrated, has not been met in any of these decisions, but rather avoided by specious reasoning. We are content with the rule as heretofore announced in *White v. International Text Book Co.*, *supra*.

Counsel for appellee argue, however, that, even conceding the rule as contended, the company was required, as a common carrier, to have exercised the highest degree of care for plaintiff's safety and protection, and the verdict is a finding that there was a breach in this duty regardless of whether its co-defendants were employees or strangers. This, however, does not eliminate the consequence of such a verdict; for, if there was a breach of duty in not shielding plaintiff from wrongdoers, it was in the expulsion from the train by its co-defendants, acting in its behalf as servants or employees in the manner disclosed by the evidence, and the jury found that therein said co-defendants were not wrongdoers. The law fixing the responsibility of the company differs somewhat, but its liability is determined by what the real actors actually did, and the doctrine of *respondeat superior* was quite as applicable. This precise question was before the Supreme Court of the United States in *New Orleans & N. E. Ry. v. Jopes*, 142 U. S. 18 (35 L. Ed. 919). Jopes was a passenger on the company's train, was shot by Carlin, the conductor, and obtained a judgment against the company, to reverse which an appeal was taken. There was testimony tending to show that the shooting was in self-defense, and the court instructed the jury, in substance, that, if the conductor shot when there was in fact no danger, though he had reason to believe and did believe that an assault on him with a deadly weapon was intended and only fired to protect himself from such assault, the company was liable, and refused to instruct that there would be no liability if the shot was fired in the reasonable apprehension of loss of life or great bodily harm, even though there may have been no actual danger. The ruling was reversed, the court speaking through Brewer, J., saying:

"It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled

to a like immunity. That such is the ordinary rule is not denied; but it is earnestly insisted by counsel that, where the employer is a common carrier, and the party injured a passenger, there is an exception, and the proposition is laid down that the contract of carriage is broken, and damages for such breach are recoverable, whenever the passenger is assaulted and injured by an employe without actual necessity therefor. It is urged that the carrier not only agrees to use all reasonable means to prevent the passenger from suffering violence at the hands of third parties, but also engages absolutely that his own employes shall commit no assault upon him. . . . If this shooting was lawfully done, and in the just exercise of the right of self-defense, there was neither misconduct nor negligence . . . The defense is that the act of the conductor was lawful. If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? Suppose we eliminate the employe, and assume a case in which the carrier has no servants and himself does the work of carriage; should he assault and wound a passenger in the manner suggested by the instruction, it is undeniable that, if sued as an individual, he would be held free from responsibility, and the act adjudged lawful. Can it be that if sued as a carrier for the same act a different rule obtains, and he be held liable? Has he broken his contract of carriage by an act which is lawful in itself and which as an individual he was justified in doing? The question carries its own answer; and it may be generally affirmed that if an act of an employe be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

The acts for which damages were claimed were those of Core and Gressley. The evidence as to whether they were guilty of any wrongdoing was in conflict. The jury exonerated them and, in doing so, necessarily exonerated the com-

pany, having found no wrong to have been committed by them, and it follows there were none for which the company could be adjudged responsible.

We are not saying that, had plaintiff applied for a new trial because of the inconsistency of the verdict, relief ought not to have been granted. What we do say is that entering judgment in favor of Core and Gressley eliminated all liability of the company and the motion for judgment dismissing the petition should have been sustained.—*Reversed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

S. J. GEDDES, Appellant, v. W. O. McELROY, Administrator,
Appellee.

PLEADING: Want of Consideration—Sufficiency. Certain pleading
1 *held* to sufficiently plead want of consideration.

APPEAL AND ERROR: Review—Appellate Court Not Trier of Fact
2, 8 —Undue Influence—Want of Consideration. On the question of sustaining a verdict, the question is not whether a verdict for the appellant would have been proper, but whether the jury was justified in accepting appellee's version of the facts. Evidence reviewed and *held* to justify a finding that a note was obtained by undue influence and without consideration.

EVIDENCE: Inconsistent Conduct—Admissions against Interest.
3 Conduct of a party inconsistent with his present contention is competent as tending to show that his present contention is an afterthought and a pretense.

PRINCIPLE APPLIED: Action against an administrator on a note for \$2,300. When plaintiff first pressed the note for payment, his only claim was that, when the \$2,300 note was executed, a third party was owing him \$3,126, and that the consideration for the \$2,300 note was a cancellation by him of \$2,300 of the \$3,126 claim. On the trial, it was shown that, a month prior to the giving of the \$2,300 note, the \$3,126 indebtedness, except \$126, had all been paid by a transaction between plaintiff and the maker of the note. Thereupon, plaintiff claimed that the consideration for the \$2,300 note was his cancellation of the debt

of \$126. *Held*, evidence as to plaintiff's conduct was admissible as an implied admission against interest, and justified the rejection of plaintiff's belated claim as to the consideration for the note.

EVIDENCE: Self-serving Declarations—Non-conclusiveness. He who
4 introduces the self-serving declarations of his adversary is not bound thereby.

BILLS AND NOTES: Consideration—Evidence to Disprove. Under
5 a plea of want of consideration for a note, evidence is admissible to disprove the existence of *any part* of the consideration contended for by the holder of the note.

APPEAL AND ERROR: Right of Review—Self-invited Error. An
6 appellant may not complain that appellee has not introduced certain evidence when it was on appellant's objection that such evidence was excluded.

APPEAL AND ERROR—Right of Review—Exclusion of Evidence—
7 **Non-necessity to Continue Offer.** When the court has once refused to receive evidence on a certain subject, such ruling is, in effect, a direction to the party offering to refrain from farther offer of evidence on the same point.

APPEAL AND ERROR: Review—Appellate Court Not Trier of
2, 8 **Fact—Undue Influence—Want of Consideration.**

BILLS AND NOTES: Undue Influence—Solicitation, Importunity,
9 **Argument.** It will not do to say that no amount of solicitation, importunity and argument, with the aged, weak and infirm, will amount to undue influence.

BILLS AND NOTES: Undue Influence—How Shown—Influence in
10, 16 **Other Matters.** On the question of undue influence, it is material to show the degree of influence exercised by the accused over the victim in matters *other* than the particular matter in question.

BILLS AND NOTES: Undue Influence—Accused Absent When In-
11 **strument Executed.** One may be guilty of exercising undue influence even though absent when the instrument in question was executed.

BILLS AND NOTES: Undue Influence—Instructions—Aged and In-
12 **firm Persons.** Instructions in *In re Ames*, 51 Iowa 596, and *Cash v. Dennis*, 159 Iowa 27, as to the effect of undue influence on an aged and infirm person, re-approved.

PLEADING: Insufficient Pleading Treated as Sufficient—Waiver.

13 The practical construction which parties place on the sufficiency of pleadings is conclusive.

PRINCIPLE APPLIED: Defendant sought to rescind a note contract on the ground of undue influence, but did not plead *that he had returned or offered to return the consideration received*. Plaintiff (a) did not move for a more specific statement, (b) did not specifically call the court's attention to said omission, and (c) did not object to the testimony bearing on undue influence except as "incompetent, immaterial and irrelevant." The omission was first objected to in motion for new trial. *Held*, the parties, by impliedly treating the pleadings as containing the said omitted allegation, were bound thereby, irrespective of section 3755, par. 9, Code, 1897, and the right to object to the omission was waived.

BILLS AND NOTES: Undue Influence—Rescission—Pleading Re-

14 turn of Consideration. Whether one seeking a rescission of a note on the ground of undue influence must allege and prove an offer to return the consideration for the note, when the *sole* consideration, if any, was a release of a debt due the payee from a third party, *quaere*.

PLEADING: Undue Influence—Rescission—Failure to Allege Re-

15 turn of Consideration—Nonprejudicial Error. Even though a pleading did not formally allege an offer to return the consideration (assuming such to be necessary) received on a note transaction sought to be rescinded for undue influence and want of consideration, such omission was immaterial when, on conflicting evidence, the jury found both undue influence and want of consideration.

BILLS AND NOTES: Undue Influence—How Shown—Influence in 10, 16 Other Matters.**EVIDENCE: "Best Evidence"—Originals Beyond Jurisdiction of**

17 Court—Copies. The production of original evidence is excused when such original is beyond the jurisdiction of the court and the possessor declines to part therewith, beyond permitting the officer taking the deposition to make copies thereof. In such case, copies duly certified by such officer as correct are admissible.

Appeal from Jasper District Court.—HON. JOHN F. TALBOTT, Judge.

MONDAY, OCTOBER 4, 1915.

THIS was a contest of a claim founded on a mortuary note filed by plaintiff against the estate of John W. Murphy, deceased. The defenses set up by the administrator were that there was no consideration for the note and that it was secured through undue influence. The case was tried to a jury, which returned a verdict for the defendant and, in answer to special interrogatories, found that there was no consideration for the note, and that it was executed by the decedent, John W. Murphy, as the result of undue influence exerted over him by the claimant, Geddes. The plaintiff appeals.—*Affirmed.*

W. G. Vander Ploeg and McLain & Campbell, for appellant.

McElroy & Cross, for appellee.

PER CURIAM: The note is in the following form:

“Murphy, Iowa, Oct. 22, 1910.

1. PLEADING: “For value received I promise to pay S.
want of con- J. Geddes \$2,300 without interest after my
sideration: death, or before if I elect to do so. This note
sufficiency. shall not be negotiable or transferable or made a collateral.
J. W. Murphy.”

The signature to the note was denied by defendant in his answer, but upon the trial the signature was conceded.

Because plaintiff raises some question that defendant did not plead want of consideration, and because of other questions raised as to the defendants' pleading, we set out the second and third divisions in full.

“Division 2. For other and further answer, the defendant avers that the written instrument described therein

was executed, if at all, as evidence of a naked promise of said J. W. Murphy to the claimant to make to said claimant a gift of the amount of money described in said instrument, upon the death of said J. W. Murphy; that said J. W. Murphy received no advantage or benefit or anything of value or any consideration for said promise or for the execution of said instrument; that the claimant neither forbore nor waived any legal right in consideration of said promise or the execution of said instrument; that said instrument was executed and delivered, if at all, without consideration, and was revoked by the death of said J. W. Murphy and is void.

“Division 3. For other and further answer, the defendant avers that the execution by J. W. Murphy of the instrument described in said claim, if said instrument was executed by him, was procured by and was the result of undue influence exercised upon and over said J. W. Murphy by the claimant, said Murphy being at that time an old man in his 86th year, of impaired faculties and enfeebled powers. That at the time of the alleged execution of said instrument, and for many years prior thereto, the claimant was a prominent and influential clergyman of the Methodist Protestant church—a religious denomination of which said J. W. Murphy was a member; and was a trusted friend and confidential adviser in whom said J. W. Murphy reposed great confidence. That the claimant, by appealing to the religious and charitable instincts of said J. W. Murphy, arousing and exciting his prejudice against inherited wealth, falsely holding himself out as unselfishly contributing his own services, time and influence to the promotion of religious and educational work, and by other means at present unknown to the defendant, so overcame his will as to cause him to execute the instrument described in said claim, the execution of said instrument being the act and deed of the claimant rather than that of said J. W. Murphy.”

At the close of the evidence, plaintiff moved for a directed verdict in his favor and to withdraw from the jury the questions as to the alleged want of consideration and undue influence, which motion was overruled. The principal grounds relied upon for a reversal are that defendant had failed to show a want of consideration for the note and had failed to show undue influence, and that therefore the general verdict and special findings of the jury are not supported by the evidence. Conceding that, had the findings of the jury been for the plaintiff, they would have support, it is not necessary to set out in detail plaintiff's evidence. We are not the triers of fact and it is not for us to pass upon a conflict in the evidence. The case being at law, the question now is whether defendant's evidence and all the circumstances in the case and proper inferences which the jury could draw therefrom are sufficient to sustain the verdict.

The undisputed evidence, or the tendency of the evidence, from which the jury could have so found, shows that, when the note in question was executed, deceased was in his eighty-sixth year. His wife, five children, and two sons of his deceased daughter were then living. He owned property in Iowa and some land in Texas, reasonably worth, in the aggregate, \$30,000. He was owing four notes executed to Kansas City University for sums aggregating \$20,000, in addition to his other debts. About the year 1898, deceased had a severe illness, after which he was never as strong as formerly. During the last five or six years of his life, he became less self-reliant and more forgetful. He would start to speak on one subject and would not finish. His neighbors observed a change in his mental condition. He was badly stooped over, feeble and weak. He would tell things and a little while later repeat the same thing. He had three meals a day with the family, but he had a room of his own in which he kept a table, writing materials, a bucket of water, crackers, candy, and other eatables, which room was not clean, and he objected to its being cleaned. Into this room

2. APPEAL AND
ERROR: re-
view: appel-
late court not
trier of fact:
undue influ-
ence: want of
consideration.

Murphy invited Geddes and there they talked confidentially. The family knew nothing about the Geddes note while Murphy was living.

Deceased was a member of the Methodist Protestant Church more than forty-eight years and was active and prominent in church work. A few years before his death, he had a considerable financial loss in a manner the witness testifying thereto did not wish to relate. Five or six years before Murphy's death, Rev. Brown and appellant had a conversation regarding Murphy's being feeble, in which conversation Geddes said that Murphy was not competent, growing out of the fact of his age and infirmities. This conversation is testified to by Brown and not denied by Geddes.

Plaintiff was one of the trustees of the Kansas City University from its first existence until a few months before the trial of this case in the district court. He was field agent and solicitor for the university prior to 1907, for a number of years. He was field agent and special agent of the university for three years, beginning in August, 1907, and was special agent for two years. He was such field agent when the Murphy notes to the university were secured. While Geddes was a member of the board, he was employed to solicit donations and contributions. The terms of his employment prior to 1907 do not appear; thereafter his compensation was fixed by a resolution of the university at sixteen per cent. on all contributions of cash and notes secured by him, and his traveling expenses. The commission was to be paid out of the cash collected by plaintiff during the period of his employment or after the expiration of his employment, from proceeds of notes personally secured by him. A resolution of the trustees of the university, passed in September, 1910, shows that there was due plaintiff at that time \$3,126. A personal memorandum kept by the chancellor of the university shows a balance of \$3,056.75 due March 1, 1910.

Plaintiff was instrumental in securing the execution by Murphy of four notes to the treasurer of the university, each

maturing one year after Murphy's death. One of these notes was for \$2,000, given in 1904; one for \$4,000, in July, 1908; one for \$4,000, in October, 1908; and one for \$10,000, dated June 18, 1909. Plaintiff married Murphy's niece. He was familiar with Murphy, addressed him as "Uncle John." He was a minister of the same church to which Murphy belonged, until a short time before Murphy's death. He frequently visited Murphy's home. Deceased frequently talked confidentially with Geddes and, upon such occasions, they withdrew to a room occupied only by themselves. The execution of the notes to the university was not known to the family of deceased until after his death, nor was the execution of the note in controversy. Plaintiff borrowed money from Murphy at different times. In the year 1910, Murphy paid one Hough, for Geddes, \$103, by check; at this time, plaintiff was present, and deceased said to him in the presence of Hough, when he was making out the check: "Now, that makes \$1,700 or \$1,800 I have paid out for you." On January 5, 1910, plaintiff was owing deceased not less than \$1,800. On that date, he gave Murphy an order on the university as collateral for the payment of several loans of money for which Murphy held Geddes' notes. Plaintiff was owing deceased on September 5, 1910; for on that date he wrote a letter to deceased saying that he hoped to be able to pay him some money as soon as he returned from Kansas City. On September 27, 1910, plaintiff gave Murphy a due bill for \$18, and it is not shown that it has ever been paid. On the same day, plaintiff gave Murphy a written promise to pay him annually \$33.60, that being due Murphy as interest at 6 per cent. on \$560, upon which sum Murphy was paying interest at the same rate on Geddes' account.

Plaintiff was a member of the board of church extension of the Iowa Annual Conference of the Methodist Protestant Church, also a member of the board of trustees of the university. Deceased was a member only of the first named board. While plaintiff was a member of both boards, de-

ceased joined with him and another member of the board to loan the university \$4,000 of the church funds controlled by the board of church extension. Later, there was some dissatisfaction in regard to this loan, because it was to run for fifteen years without interest. In August, 1908, in a letter to the chancellor of the university in regard to his obtaining the execution of the Murphy notes, plaintiff said:

“I note what you say about the J. W. Murphy note and certainly sincerely thank you for it. Since last writing you I obtained positive knowledge concerning that note. Murphy says that I persuaded him to give it in a talk I had with him a short time before the General Conference. He was not asked for this information and gave it just because he wanted to I suppose. He does not know that you and I have had a word about the matter. I do not mean to say that I did not start him to talking about the gift, for I did, and then he told me all about it as I had hoped he might do.”

In the same year, plaintiff wrote to the chancellor:

“For six months I have been trying to get J. W. Murphy for some large amount, and he had partially promised. Today he came and told me, in great glee, that yesterday he signed and mailed to you a note for \$4,000. He expected me to feel very glad that he had done that generous act, and I was very glad, and thanked him very much; but found out that I have selfishness enough still left in me to feel some vinegary regret that he had not let me report that snug gift.”

In another letter, plaintiff wrote to the same person:

“Concerning the J. W. Murphy note I feel like saying but little. I was not surprised that he sent it directly to you. I knew him well enough to know that this was just what he would probably do, and I had said to him that he might hand it to me or mail to you as he should choose. This

was a short time to Gen'l Conf., when I went to his place and talked matters over with him. He told me of the difficulties in the way, but it was in that talk that I became satisfied that he would put up another mortuary note. After his wife's return from the West, and within the past month, I went to his home twice, making other matters an excuse for going, but my real purpose was to get the university before her in a way helpful to him, and I felt that I accomplished something of the kind, and I think he felt so. But how much all I have done had to do with his gift I am sure I do not know. It may have had very little or nothing to do with it. I think that an agent gets many a note largely through the aid of your influence with many of our people. I have often spoken of this to you and to others. I have said that I was not surprised, and I was not, but when he told me he had sent it in I realized for the first time what the effect might be upon myself and was overtaken with the sense of chagrin. Yet he did what I supposed he would do. It was only by the breadth of a hair that I was permitted to turn over to the university the Ch. Ecy. loan. Murphy wanted to do it himself, and I told him to go ahead. At the very last, circumstances put the notes, money, etc., into my hands to deliver. It is not because J. W. distrusts another; it is just Murphy's way, and it is usually best to humor it. Then he did not and does not know that sending his note through me could make any difference to me. . . . I do not doubt that the pull of your influence on Brother Murphy had very much to do with his gift. I believed it all the time and tried to make the very best use of it."

In regard to the \$4,000 loan to the university by the extension board, a witness says: "In this particular case, Mr. Geddes and Mr. Murphy agreed—they seemed to be one. There seemed to be no diversity of opinion between them in regard to the loan."

The testimony shows that Murphy was a man of positive

character. After the death of Mr. Murphy, plaintiff told the sons of deceased that the note in suit was executed for commissions that he was to receive from the university on subscriptions and that he had cancelled his claim against the university after he got the note from their father. Plaintiff claimed no other consideration therefor than the cancellation by him of a corresponding amount of his claim against the university for commissions earned. This matter will be referred to more fully later in the opinion. As before stated, a resolution in the records of the university showed that the amount due plaintiff for commissions on a certain date was \$3,126. In regard to this, plaintiff testifies: "I think it was after I terminated my work with the Kansas City University when I was advised of a resolution of a settlement between myself and the university."

Murphy paid Geddes, as trustee of the university, September 27, 1910, the sum of \$3,000. Geddes, as trustee, executed to deceased two receipts therefor. These receipts are regarded as important and we set them out.

"Newton, Iowa, September 27, 1910.

"Received of J. W. Murphy, \$2,900 to be applied as part payment on a mortuary note of \$10,000, bearing date of June, 1909.

"\$2,900.

S. J. Geddes,

"Trustee of Kansas City University."

"Newton, Iowa, September 27, 1910.

"Received of J. W. Murphy one hundred & no/100 dollars, in full of one promissory note, of date of September 5, 1907, given in favor of Kansas City University.

"\$100.

S. J. Geddes,

"Trustee of Kansas City University."

The letter by plaintiff enclosing these receipts will be referred to later.

It will be noticed that these receipts do not refer to the

\$2,300 note and it is defendant's contention that this \$3,000 was paid in money. These receipts were executed nearly a month before Murphy executed to plaintiff the \$2,300 note in suit.

October 5, 1910, seventeen days before the \$2,300 note was executed, deceased wrote Chancellor Stephens that he had paid Geddes the \$3,000. Geddes retained the \$3,000, applying it on his account against the university, and writing the chancellor on September 28th, saying, "I retain the \$3,000 and ask the same to be charged to my account." The university complied with plaintiff's request. The record is silent regarding the unpaid balance of said account, if any there was. It is the contention of defendant that the payment of the \$3,000 on September 27th had no connection with the note in suit of October 22d, and that the two transactions are entirely independent.

It is insisted by defendant that there is no evidence tending to show that the execution of the \$2,300 note entered into or affected Geddes' account against the university. True, the sons of Murphy testified that plaintiff, as a part of his statement to them, stated, in substance, that the consideration for the \$2,300 note was the cancellation by him of a corresponding amount of his claim against the university. This was a self-serving declaration by plaintiff, and while it is proper to consider it in connection with the rest of his declarations on that subject, we think the other circumstances in the case were such that the jury could have found against the plaintiff as to such self-serving statement. That is to say, the other circumstances were such that therefrom the jury might properly draw the inference that the alleged consideration for the \$2,300 note was not the cancellation of plaintiff's claim against the university for commissions. The documentary evidence is fragmentary. Murphy is dead and cannot give his version of the transaction and plaintiff's mouth is closed by the statute as to personal transactions and communications, so that it is necessarily a matter of inference

from the facts and circumstances. The proof and inferences to be drawn from the circumstances were for the determination of the jury.

The circumstances narrated show the general tendency of the testimony; there are some other circumstances which will be stated in connection with the different points. There are some others which should be briefly noticed. Mr. Murphy was a member of and an officer in the church before referred to, from the time of its organization until his death. He was much interested in the Kansas City University. In 1910, he sold a farm in Marshall county and gave \$1,000 to each of his sons and \$500 to each of his daughters. But it is shown that his wife opposed selling the land unless he would agree to divide a part at least of the proceeds among his children. At different times, deceased had said that he expected to give his property to some benevolent institution. There is evidence that he thought his children were trying to get his money, but we fail to find anything in the record to justify such a belief. Deceased continued to manage his own personal affairs and continued to hold the office of secretary of the Iowa Conference and other offices in the church until his death.

1. First as to the consideration. As before stated, the defendant contends that the receipts given in connection with the \$3,000 payment from Murphy to Geddes are dated nearly

3. EVIDENCE: inconsistent conduct: admissions against interest. a month earlier than the note in controversy, and proceeds upon the theory that the \$3,000 payment made by Murphy to plaintiff, retained by plaintiff, and charged to his account

by the university, was a cash transaction entirely separate and distinct from the \$2,300 note in controversy, and therefore incapable of furnishing any consideration for the note in suit. The theory of plaintiff was that the \$2,300 note represented part of the \$3,000 payment by Murphy to plaintiff, to be applied upon the mortuary notes which Murphy had previously given to the university; plaintiff claiming that

the university was indebted to him for a sum slightly in excess of \$3,000; that he retained Murphy's payment to him, including the note in controversy, caused Murphy to be credited for the payment upon his mortuary notes, and caused the payment to be charged by the university to plaintiff on the account which it owed him for services rendered; or that, even if the \$3,000 payment by Murphy had been made in cash, since the amount due him from the university was either \$3,056 or \$3,126, there would still be left a small balance, the release of which would constitute a sufficient consideration for the \$2,300 note; claiming that his account against the university has been, in fact, entirely released and cancelled.

Appellant urges that there is no affirmative showing to negative the possibility of his having cancelled this small balance as a consideration for the note in suit. In answer to this, defendant contends that plaintiff is not in a position to urge a reversal because of the absence of such evidence, because the defendant offered to show that such balance had not been cancelled and, upon objection by plaintiff, the court excluded such evidence. Defendant concedes that such ruling was erroneous. Defendant's cases upon this proposition will be referred to later in the opinion. It is, of course, true, as contended by appellant, that a contract in writing signed by the party to be bound imports a consideration. The trial court, in the instant case, placed the burden of proof upon defendant to show want of consideration. The plaintiff cites cases holding that verdicts must have evidence to support them and, where there is no substantial evidence to overcome a prima-facie case, a verdict should be directed.

But we are of opinion that there was sufficient evidence of want of consideration to take the case to the jury upon that issue. When plaintiff urged Bower Murphy and Ellsworth Murphy, sons of decedent, to consent to the allowance and payment of the note in suit, he undertook to state what the consideration for the note was. The situation was such

that he might then be expected to mention everything constituting such consideration. The only claim in that respect made by him at that time was that the note was a part payment of his claim of \$3,056 or \$3,126 against the university. He did not mention the fact that \$3,000 had been paid thereon a few days before the note was given, and claim that the consideration for the \$2,300 note was the comparatively trifling amount of \$56 or \$126 (the alleged balance of his claim after the payment of \$3,000), though, as already stated, that is the claim, or one of the claims, of appellant in this court. The failure of plaintiff to mention any other consideration at that time could very properly be considered by the jury as an implied admission against interest to the effect that there was nothing else which could be called a consideration, and this would constitute proof sufficient to negative the existence of a consideration in any other form than that urged by him at that time. Thus, it has been held that plaintiff's schedules of personal property filed with the township assessor, and verified by her affidavit, which contained no statement of her authorization of the note sued on, were admissible to support an allegation that she did not own the note at the time such schedules were made. *Fudge v. Marquell*, (Ind.) 72 N. E. 565. In an action against the estate of a decedent, upon a note which was equal in amount to the entire value of the decedent's estate, evidence that plaintiff, in a conversation with one of the heirs, who was subsequently made administrator, as to the renting of the decedent's land, did not mention the note, is admissible. *Watson v. Newell*, 142 N. Y. Sup. 653.

Objection to one item alone may imply admission of the rest. Abbott's Trial Evidence, p. 566 (2d Ed.).

"Conduct of a party inconsistent with his present contention may tend to show that the latter is an afterthought, and proof of such conduct is therefore competent as an admission. Thus, where defendant denies liability, it may be shown

that he made no denial on a particular occasion when a denial would have been natural, but that he rested his defense on some other ground, or endeavored to gain time by promises of settlement, or tried to arrange favorable terms of payment. In case of a plaintiff or other claimant, it may be shown that he has failed, under suitable circumstances, to advance the demand upon which he now relies." 16 Cyc. 954, 955. See, also, *Williams v. Harter*, 53 Pac. 405 (121 Cal. 47); *West Chicago Railway v. Dougherty*, 89 Ill. App. 362. In a claim against a decedent's estate on a note, evidence by claimant that it was founded on a consideration which was not sufficient to support it destroys the presumption that there was some consideration other than that proved by claimant. *In re Pinkerton's Estate*, 99 N. Y. Supp. 492; *Blanshan v. Russell*, 52 N. Y. Supp. 963, affirmed in 161 N. Y. 629 (55 N. E. 1093); *Downs v. Racine*, (Mo.) 162 S. W. 331.

Defendant introduced in evidence the declarations of plaintiff, some of which were self-serving. While it is proper to receive such self-serving declarations which are a part of the same conversation, defendant is not bound by such statements favorable to the declarant. He may rebut such statements or show them to be erroneous, and it is for the court or jury to reject such portions of the statement, if any, as appear to be inconsistent, improbable or rebutted by other circumstances in evidence. Jones on Evidence, Secs. 293, 294 (Pocket Ed.).

4. EVIDENCE:
self-serving
declarations:
non-conclu-
siveness.

From the evidence, the jury could have found that, at the time the note in suit was given, plaintiff was indebted to Murphy for more than the amount of the note, counting the money Murphy had paid out for him in cancelling various debts, and could have found from the evidence that the note constituted no part of the \$3,000 payment. As stated, the \$3,000 payment made to plaintiff by Murphy was nearly a month before the \$2,300 note was executed, and in referring to this \$3,000, plaintiff himself speaks of it as a payment in

money. Under date of September 28, 1910, plaintiff wrote Chancellor Stephens a letter enclosing the two receipts before set out, in which he says, in part:

“J. W. Murphy has paid to me for the University the sum of \$3,000 and I have receipted to him for same. The *money* is to be applied as follows (as shown by the receipts I gave him, and as shown by the receipts which I now enclose to you): . . . I retain the \$3,000 and ask the same to be charged to my account as ordered by the receipts enclosed. . . . The payment of this money by Mr. Murphy at this time greatly relieves my financial strain, and of course will be gratifying to you and to the university.”

None of the documents referring to this \$3,000 refer to the \$2,300 note as a part of it. So far as the note is concerned, that could not relieve plaintiff's financial strain because, by its terms, it was “non-negotiable” and could not be used as collateral, and there is no evidence that he did obtain money upon the note. It is contended by appellant that the use of the term “money” by plaintiff in the letter was used in its broad and popular sense and that it could include the note in question. It is true that it is used in that sense sometimes, but we are of opinion that the inferences to be drawn from the circumstances in this case were for the jury. They might have adopted plaintiff's theory, but they did not do so.

As stated, plaintiff now urges that, even after the payment of the \$3,000, there was a small balance left of his account against the university, that the note might have been

5. BILLS AND
NOTES: con-
sideration:
evidence to
disprove.

a part of another later payment by Murphy, and that the cancellation of this small balance is a sufficient consideration for the note, and plaintiff now complains that defendant did not prove on the trial of the case that this balance had not been paid or cancelled; but, as before stated, the defendant offered to prove that fact by witness Stephens, chancellor

of the university; but the evidence was ruled out upon the objection of the plaintiff. It seems to us that the evidence was clearly competent and the ruling erroneous, and that plaintiff ought not to be permitted to profit by the error of the court caused or invited by the plaintiff. As said by this

6. APPEAL AND
ERROR: right
of review:
self-invited
error.

court in *Spicer v. Webster City*, 118 Iowa 561, 562, the defendant should not be permitted to profit by its objection to the very proof which it now insists should have been made and which it could have furnished had it chosen to do so. See, also, *Walsh v. New York C. & H. R. Co.*, (N. Y.) 97 N. E. 408, 37 L. R. A. (N. S.) 1137. For other cases to the same point, see *Sours v. Great Northern Railway*, (Minn.) 84 N. W. 114; *Roche v. Nason*, (N. Y.) 77 N. E. 1007, 1009; *Hahl v. Brooks*, (Ill.) 72 N. E. 727, 728; *Lincoln County v. Chicago, B. & Q. R. Co.*, (Neb.) 108 N. W. 178, 180; *White v. Moffett*, (Ark.) 158 S. W. 505, 507; *Paul v. Western U. T. Co.*, (Mo.) 145 S. W. 99, 102; *Vance v. Drug Co.*, 149 Ill. App. 499; 3 Cyc. 252; *Spaulding v. Mott*, (Ind.) 76 N. E. 620, 624.

The offered evidence just referred to was contained in a deposition. The answers to the questions did not get to the jury because of plaintiff's objections. But the answers

7. APPEAL AND
ERROR: right
of review: ex-
clusion of evi-
dence: non-ne-
cessity to con-
tinue offer.

thereto are set out in the record in this court, and it is said by plaintiff that, if the evidence had been admitted, it would not have established the fact which plaintiff now says it was incumbent upon defendant to prove. It may not have been sufficient to have convinced the jury, but the excluded evidence would tend to prove the fact. Aside from this, the ruling of the court upon plaintiff's objection to the offered evidence was, in effect, an exclusion of all evidence upon that subject. So far as we know, the defendant may have had other witnesses to prove the point; but defendant had the right to assume that, if other similar evidence had been offered, it would have been excluded. As

bearing upon this point, see *Knudson v. Parker*, (Neb.) 96 N. W. 1010, 1011. It should be kept in mind also that the statements made by plaintiff to the sons of deceased negative the idea that the note was given to satisfy any claim as small as \$126. For the reasons given, we think the court properly submitted to the jury the question as to the alleged want of consideration, and that the verdict and special finding have sufficient support. The answer of defendant, which has been before set out, was sufficient to raise the question as to the want of consideration.

8. APPEAL AND
ERROR: re-
view: appel-
late court not
trier of fact:
undue influ-
ence: want of
consideration.

2. On the question as to the alleged un-
due influence, we shall not again refer to
the evidence at any length. We are of
opinion that it is sufficient to take the case
to the jury on that proposition. It is true,
as said by plaintiff, that solicitation, importunity, argument

9. BILLS AND
NOTES: undue
influence: so-
licitation, im-
portunity, ar-
gument.

and persuasion are not necessarily undue in-
fluence; but it will not do to say that no
degree of importunity and persuasion may
amount to undue influence with a person of

great age and enfeebled to some extent, physically and men-
tally, and where the relations between the parties are inti-
mate. We shall content ourselves with giving plaintiff's cita-
tions at this point without discussing them or comparing the
facts of the cases with the facts in the instant case. They
are: *Muir v. Miller*, 72 Iowa 585, 590; *Denning v. Butcher*,
91 Iowa 425; *Beith v. Beith*, 76 Iowa 601; 9 Cyc. 455.

There is some evidence to sustain the charge of undue
influence and, as reasonable minds might reasonably differ in
their conclusions, the question is for the jury. *Estate of
Jones*, 130 Iowa, at page 184; *James v. Fairall*, 154 Iowa 253.
In the case last cited, the court stated that, although the
evidence was not strong, it was suggestive not only of undue
influence but of fraud as well, and said: "Fraud and undue
influence can rarely be established by direct proof. As a rule,
no one knows what influences are used to accomplish such

ends. At best, the case must depend largely upon circumstances." In the instant case, if there was no

10. **BILLS
AND NOTES:**
undue influ-
ence: how
shown: influ-
ence in other
matters.

consideration for the note, the obtaining of the note itself would be fraud. That the influence exerted on a party by another may be shown by proof of the influence in other

matters, and that such proof is entitled to great weight, see *Good v. Zook*, 116 Iowa 582. The same case and others hold that, although a person may not be shown to be of unsound mind, yet it is proper to take into consideration his mental condition, age, and the like, as bearing upon the question of undue influence, and that what would not be improper influence of a person in sound health might be held improper as to a person in feeble mental and physical condition. *Lingle v. Lingle*, 121 Iowa 133; *Will of Wiltsey*, 135 Iowa 430, 438; *Will of Convey*, 52 Iowa 197.

It is not necessary that a person charged with exercising undue influence must have been present, commanding and coercing such act, if the influence was actually operative in inducing it. *Brackey v. Brackey*, 151 Iowa

11. **BILLS AND
NOTES:** un-
due influence:
accused ab-
sent when in-
strument ex-
ecuted.

99, 101, and cases. As bearing upon this question, the mental and physical condition of Murphy and his age should be considered, although mental incompetency is not set up

as a separate defense. Strictly speaking, there was no fiduciary relation existing between plaintiff and deceased, yet their relations, as shown by the record, were very close. The influence exerted by plaintiff over Murphy in other matters, which the jury could have found from the letters and transactions between them, is a matter proper to be taken into consideration; the fact that, even under the view of the evidence most favorable to plaintiff, there was no consideration for the note in suit of a character directly beneficial to Murphy is a matter properly to be considered; and the fact that plaintiff did not disclose to Murphy, or concealed from him, important facts, such as the fact that he (plaintiff) was receiving

a commission of 16 per cent. upon Murphy's notes to the university, which commission constituted, according to plaintiff's claim, the greater part of the debt he claims Murphy was paying to him by the note in suit, is also a circumstance. Plaintiff himself said to witness Brown that Murphy was incompetent. Murphy's denunciations of his family and his notion that they had turned against him, although his family had always considered their relations as harmonious and knew nothing of the existence of any trouble, constitute a circumstance bearing upon his mental condition. It is true he had been retained in his position in the church, the work of which, from long experience, he could probably do almost automatically. Plaintiff was the nephew of Murphy by marriage; he called him Uncle John; knew all of Murphy's ways and peculiarities. In one of plaintiff's letters, he says, "It is just Murphy's way and it is usually best to humor it"; and in another, "I went to his home twice, making other matters an excuse for my going, but my real purpose was to get the university before her (his wife) in a way helpful to him." Deceased had confidence in plaintiff; frequently talked confidentially with him apart in his private room. In one of plaintiff's letters, he wrote that he was going to "get Murphy for a large sum." Deceased had frequently assisted plaintiff financially and in considerable sums. Deceased paid out for plaintiff in money more than he had ever advanced to any of his sons, without causing any estrangement between plaintiff and deceased. Plaintiff did not disclose to Murphy the fact that the execution of the notes to the university was in any way beneficial to appellant; for in one letter plaintiff writes, "He does not know that you and I have had a word about the matter," and again, "He did not and does not know that sending his note through me could make any difference to me." The giving of the note in suit was connected with the giving of the other notes; the giving of the notes was not known to Murphy's family. Without referring further to the circumstances in the case, we conclude that the

finding of the jury has sufficient support on the question of undue influence.

12. **BILLS AND NOTES: UN-
due influence:
instructions:
aged and in-
firm persons.** 3. The instructions given by the court are substantially the same as the language used in the case of the *Will of Mary Ames*, 51 Iowa 596, and approved in *Cash v. Dennis*, 159 Iowa, at 27.

18. **PLEADING:
insufficient
pleading
treated as
sufficient:
waiver.** 4. Plaintiff's third assignment of error is stated thus: The fact that the third count of defendant's answer does not state facts sufficient to constitute a defense is a ground for a new trial, under paragraph 9, Sec. 3755 of the Code; that said count does not state facts sufficient to constitute a defense because the restoration of the consideration received for the note is an essential element of the defense of undue influence; that defendant wholly failed to prove the defense alleged in the second count, that is, the want of consideration, hence plaintiff was prejudiced by the court's refusal of a new trial on the ground that defendant did not restore or offer to restore the alleged consideration for the note. We have already held that defendant did not fail as to his second defense, and the jury found that there was no consideration for the note; hence there was no consideration received by deceased which he or his representative was bound to restore.

Defendant contends that, even if it be conceded that the defense of undue influence was not properly pleaded because of failure to allege a return or tender of any consideration received, nevertheless appellant waived the objection by proceeding to trial as though the issue were in the case, and by failing to urge any objections to evidence of undue influence on account of alleged defect in the answer. There was no motion by plaintiff for a more specific statement of the answer. Plaintiff objected to some of the evidence by the general objection that it was incompetent, irrelevant and immaterial, but did not, in the objection, call the court's attention specifically to the point relied upon in the motion for new trial and here—that defendant had failed

to allege, as a basis for rescission, a return or tender of any consideration received. The real issue tendered by the third count of the answer was the alleged undue influence. The matter of rescission was merely an incident thereto and not a separate and distinct issue. On the question of waiver, we have said:

“To avail themselves of the fraud mentioned as a complete defense, the contract must have been rescinded, and appellant contends that rescission was neither pleaded nor proven. It may be, as said by appellee, that the allegations in the answer were sufficient, but these were withdrawn by the amended and substituted answer, which, though specifically alleging the fraud, omitted any reference to rescission. The trial, however, proceeded on the theory that whether there had been a rescission was in issue. No objection to the evidence bearing thereon because not alleged was interposed. . . . We are satisfied that the defect in the amended and substituted answer was overlooked at the trial which proceeded as though rescission of the contract had been averred therein. In these circumstances the omission cannot be urged as a ground of reversal”—citing cases. *Cox v. Cline*, 147 Iowa, at 356.

“Evidence was introduced, without objection, not only showing the understanding between the parties, not expressed in the lease, was that the tenant should have the milk after raising the calves, but also tending to show that in the practical execution of the terms of the lease both treated and expressly agreed to treat the cream or butter fat as equivalent to butter, the manufactured article. The difference to the landlord was insignificant, and if in carrying out the lease he, as well as the tenant, recognized the sale of the butter fat as practically equivalent to that of butter, the former thereafter should not be permitted to insist upon any distinction between them. Possibly the answer was not as specific as it should have been; for, while it put in issue the claim that the tenant had not divided equally the ‘other

proceeds of the farm,' the trial proceeded on the theory that the pleading was sufficient, and, as this matter was the only one wherein there was any dispute in the evidence, it could not have escaped the attention of the court. Attention to the course of the trial was its duty, and, the parties having treated the pleading as sufficiently specific, the court should have accepted their construction. Were this to be regarded as a separate and distinct issue, there might be some doubt whether the court might be held to have erred in not submitting it. In several cases it has been held proper to submit issues not raised by the pleadings, when consent thereto or acquiescence therein has been established by failure to object to the introduction of evidence bearing thereon or in some other manner. See *Fenner v. Crips*, 109 Iowa 455. And where this has happened the refusal to submit such an issue was adjudged error in *Hanson v. Kline*, 136 Iowa 101." *McLeod v. Thompson*, 138 Iowa 304, at 306.

Some of these cases have been decided since paragraph 9 of Sec. 3755 was added to that section of the Code of 1897. If the parties at the trial treated this matter of tender as though it had been pleaded, it would be the same as though it had in fact been pleaded and, under such circumstances, the rule in prior cases as to waiver would not be changed by the addition to Sec. 3755. We think, under the record in this case, the parties treated the question now under consideration as properly in the case, and that plaintiff may not now ask a reversal on that ground.

Appellant cites *Donahue v. Prosser*, 10 Iowa 276, and cases from other jurisdictions on the point that restoration of property is an essential element of the defense of undue influence. Defendant concedes that such is the general rule, but contends that there are exceptions to it and that, if the evidence disclosed circumstances rendering a return or tender unnecessary in connection with the defense of undue influence, the issue was properly submitted to

14. **BILLS AND NOTES:** undue influence: rescission: pleading return of consideration.

the jury; that Murphy or his estate could rescind for fraud and undue influence, and that in such event he or his estate would be entitled to be put in *statu quo* as well as plaintiff; that the only way plaintiff's account against the university could be restored would be by the estate's paying an equivalent amount to the university, if, as contended by appellant, there was a release of plaintiff's claim for commissions; that if this is required, the estate is not placed in *statu quo* and that the right of rescission is practically denied; that where such a situation arises through fraud, undue influence, or advantage taken of an incompetent (no beneficial consideration capable of being returned having come into the hands of the party seeking a rescission), relief in the form of rescission will, nevertheless, be granted, and the loss made to fall upon the party at fault, for the return or tender is not required out of any tenderness of the law for the one guilty of fraud, and he cannot, therefore, complain if he loses in the venture money paid or property turned over to a third person, which complainant is not in position to restore. The only consideration claimed by plaintiff for the note given by Murphy is the release of his claim for commissions for obtaining mortuary notes given by Murphy, for which there was no material consideration moving to Murphy.

We shall not take the time to discuss the cases cited by appellee to this proposition, because, as we have already indicated, we think appellant waived the defect in the answer.

We simply cite the cases. *O'Shea v. Vaughn* (Mass.) 87 N. E. at 618; *Wilson v. McCon-*
 15. PLEADING: undue influence: rescission: failure to allege return of consideration: nonprejudicial error.
nell, (W. Va.) 77 S. E. 540; *Ring v. Ring*, 111 N. Y. Supp. 713; 6 Cyc. 307; *Mitchell v. Squire*, 128 Iowa 269; *Guckenheimer v. Angervine*, 81 N. Y. 394; *Thrash v. Starbuck*, (Ind.)

44 N. E. at 546. Even though plaintiff had not waived the question as to the pleadings, the jury having found in answer to special interrogatories that there was undue influence in obtaining the note and that there was no consideration there-

for, and the evidence disclosing without conflict a situation which would not require restoration or tender of any supposed consideration for the note, there was no prejudicial error in giving instructions which would not make restoration or tender essential to the defense of undue influence.

5. The court admitted in evidence the mortuary notes which had been given by Murphy, a copy of the resolution of the university as to plaintiff's compensation and the amount

16. **BILLS
AND NOTES:**
undue influ-
ence: how
shown: influ-
ence in other
matters.

due him for commissions, also copies of letters alleged to have been written by plaintiff to Chancellor Stephens. These are all argued together and very briefly by appellant. The argument is that such evidence was calculated

to mislead the jury and inflame their minds against the claimant. We think the notes were properly admitted. It is claimed, and there is evidence tending to show, that undue influence was exercised over Murphy by plaintiff to secure such notes. Undue influence is urged as a defense to the note sued on. Under this defense, it is competent to show the surrounding facts and circumstances, including the influence of the party in other matters and upon other occasions. *Good v. Zook, supra*. And further, plaintiff was claiming a commission for securing the mortuary notes and it was proper to inquire whether or not appellant did secure such notes so as to entitle him to a commission. As to the resolution, there is

17. **EVIDENCE:**
"best evi-
dence": origi-
nals beyond
jurisdiction
of court:
copies.

some confusion in the record. The matter is referred to in the abstract and two additional abstracts. It appears that plaintiff's objection to the offer was at first sustained, but later, and as plaintiff himself had testified in

rebuttal in regard to the resolution, the court admitted the copy in evidence. As we understand the record from the abstracts and amendments thereto, the original book containing the resolution was produced when Chancellor Stephens' deposition was taken in Kansas City, and the witness was not willing to have the original book returned with the deposi-

tion, and a copy thereof was made and certified to be correct by the notary taking the deposition. This compared copy was returned with the deposition and offered in evidence. We think that, under the circumstances, the resolution was admissible. *Bullis v. Easton*, 96 Iowa 513. The facts are not like *Ruthven v. Clarke*, 109 Iowa 25, 30, where the original document was in possession of a party to the suit who had offered the copies, and no reasons for failing to produce the originals were shown. Furthermore, the resolution was embodied in a question to plaintiff and the resolution read as a part of the question, which question was not objected to and witness answered that he thought he received from some officer of the university a copy of the resolution, and that he was grateful when it was reported to him that the university had taken such action. What has been said in regard to the certified copy of the resolution applies also in part to the letters. The originals were produced when the deposition was taken in another state. The witness testified that the letters produced were received by him from appellant and, to the best of his knowledge, they were in the handwriting of appellant. In addition to this, appellant was called to the stand by the appellee in the district court, the letters or copies were read to him, and he was asked whether he had not, in fact, written such letters. While refusing to acknowledge their authenticity directly, he stated that he would not say that he did not write them. The copies offered were made from the originals by the notary taking the deposition and the correctness of the copies is certified to by him. We think there was no error in admitting these documents.

There was no reversible error and the judgment is—
Affirmed.

DEEMER, C. J., WEAVER, EVANS, GAYNOR and PRESTON,
JJ., concur.

MARY ETHEL MAY HORNER, Appellee, v. MARY JANE MAXWELL
et al., Appellants.

SPECIFIC PERFORMANCE: Wills—Agreement to Make—Degree
1 **of Proof.** The proof required to establish an agreement to make a will or to leave property to a certain one must be clear, satisfactory and convincing. Evidence reviewed and held to establish the contract alleged.

WITNESSES: Competency—Transaction with Deceased—Agreement
2 **to Make Will to Child—Testimony of Mother.** The mother of a child is a competent witness to testify to a transaction had by her with deceased persons, in which such deceased persons agreed to adopt and will their property to such child. In such case, the the mother is not a person "from, through or under whom" such child derives any title or interest, within the meaning of Sec. 4604, Code, 1897.

EVANS and SALINGER, JJ., dissent.

WILLS: Oral Agreement to Make—Homestead as Affecting Valid-
3 **ity.** An oral agreement of a husband and wife to will the property possessed by them at the time of their death to a certain child, with no restriction on the right to dispose of any of their property during their lifetime, is not invalid because such agreement might include a homestead.

EVIDENCE: "Parol Evidence" Rule—Merger of Prior Oral Con-
4 **tract—Agreement to Will—Articles of Adoption.** An oral contract to give and to will all of one's property to a child, if the parent of said child will permit the promisor to adopt said child, is not merged in subsequently prepared articles of adoption, drawn in strict compliance with the statute and signed and acknowledged by the parent of the child and the adopting parties, but not recorded by the adopting parents, *said articles containing no provision as to property rights.*

DEEMER, C. J., EVANS and SALINGER, JJ., dissent.

Appeal from Pottawattamie District Court.—HON. THOMAS
ARTHUR, Judge.

WEDNESDAY, JUNE 30, 1915.

REHEARING DENIED MONDAY, OCTOBER 4, 1915.

ACTION to specifically enforce an alleged contract of Geo. H. and E. May Crisp to leave plaintiff all their property. From a decree entered as prayed, the defendants appeal.—*Affirmed.*

I. N. Flickinger, Clifford Powell, and Tinley, Mitchell & Pryor, for appellee.

W. H. Kullpack, for appellants.

LADD, J.—I. The plaintiff is the child of Mollie Clue, born out of wedlock, who became a member of the household of Geo. H. and Elizabeth May Crisp early in 1888. She was first cared for by them at the instance of her mother, and afterwards, on April 17th of that year, articles of adoption in due form were signed by the mother and the Crisps. Therein the mother yielded the custody of her child and the Crisps undertook to adopt her as their own in accordance with the statutes of Iowa, and agreed that they would “nurture, support and educate her as their own child and in all and every respect take the place of parents, both natural and legal.” The child was reared by them, though the articles of adoption never became effective, owing to omission to record, and now brings this action to recover the estate they left, on the ground that they orally agreed that she should be entitled to and become the owner of all of the property of whatsoever kind of which they should die possessed. The record is quite clear that Mr. and Mrs. Crisp declared that they had no children and expected none, and that all their property should go to Ethel, the plaintiff. The natural mother, who since married one Armstrong, testified that she first left the child with the Crisps to be boarded for a compensation, and shortly afterwards advised them that she could not pay as

1. SPECIFIC PERFORMANCE:
wills: agreement to make:
degree of proof.

much as was required and would have to change boarding place, whereupon they replied that, rather than give her up, they would keep and adopt her; that she objected to this at first, when they assured her that they would give her a home as though she were their own, and when they died would leave her everything they had; that they had no children and never expected to have any; that she hesitated about parting with her child, and they insisted and repeated their assurance, and that finally the articles were prepared and she supposed the contract in reference to willing the property was included therein, these being given to the Crisps; that Mrs. Crisp objected to recording the instrument for that she did not wish her folks in the east to know anything about the adoption, but wished it to appear that the child was their own, "so that when they died she would have no trouble in getting their property." A. T. Flickinger testified that he prepared the articles of adoption and, after these were signed, advised that it was necessary to record the same; that what he did was in the interest of both parties without employment as an attorney; that previous to the execution thereof, the Crisps said they had no children and that all their property should go to Ethel; that they would make a will and leave all their property to her if the mother would consent to the adoption, and that she consented thereto. At that time, Miss Clue was a domestic in his home and continued as such for several years afterwards. Mrs. Stork testified that Mrs. Crisp, after her husband's death, said to her that the understanding between her husband and herself was "that Ethel (plaintiff) was to have everything they had when they died. If he died first, then she was going to carry out his wishes to the very best of her ability." This evidence was uncontradicted save by that of the defendant, a sister of Crisp, who was visiting in the home of the Crisps for several months about the time of the adoption and heard no conversation about their intentions with reference to the disposition of the property, and the further fact that Mrs. Crisp, shortly before

her death, executed a will leaving to plaintiff \$5 and all the remainder of her property to the defendant, and a further circumstance that Crisp, prior to his death, willed all of his said property to his wife. But Mrs. Crisp had executed a previous will in 1902, leaving her property to the plaintiff. The adoption papers were never recorded.

The evidence disclosed that the relations between Mrs. Crisp and plaintiff were always affectionate, but that the former grieved over the latter's marriage, which happened shortly before the last will was executed, and insisted that she had lost her baby. The significance of one of these wills about offsets that which should be accorded the other, and the will of Geo. H. Crisp, leaving all to his wife, is not inconsistent with the alleged promise that when they (both) died, all should go to the child. The court did not err in finding the alleged oral agreement established with that degree of certainty which the law exacts. See *Stiles v. Breed*, 151 Iowa 86; *Finger v. Anken*, 154 Iowa 507.

II. The competency of the mother as a witness was challenged because of Sec. 4604 of the Code, declaring that "No party to any action or proceeding, . . . nor any

2. WITNESSES: competency: transaction with deceased: agreement to make will to child: testi- mony of mother.	person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise . . . shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the
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commencement of such examination deceased . . . against . . . "any "legatee, devisee . . . of such deceased person." In the transaction of which she testified, she did not purport to act as agent for her child; she seemed rather to be making a gift of her daughter *inter vivos*. She is not seeking to enforce the contract then made, though her testimony and that of plaintiff establishes its complete performance on their part. The fact that she might profit by her testimony ought not to exclude it. Neither the estate in dis-

pute nor the interest therein sought to be recovered by plaintiff was derived from, through, or under the mother, for she never had or claimed any right, title or interest therein. "From, through or under" has reference to the devolution of title, and not the agencies by which this was effected. In *Stiles v. Breed*, 151 Iowa 86, the person acting as agent for the father was held competent to testify, and what was there said sufficiently vindicates the ruling that the mother was a competent witness, notwithstanding the objection interposed. It has the support of *Crawford v. Wilson*, 139 Ga. 654 (44 L. R. A. (N. S.) 773); and *Stowers v. Hollis*, 83 Ky. 544. See also *O'Neill v. Wilcox*, 115 Iowa 15, and *Robertson v. Campbell*, 168 Iowa 47. In *Rosseau v. Rouss*, 180 N. Y. 116 (72 N. E. 916), the court appears to have confused acquirement by virtue of a contract of a person with deriving title or interest from, through or under such person, and to have construed a statute like that of this state as though it were like that construed in *Asbury v. Hicklin*, (Mo.) 81 S. W. 390.

We are not inclined to add to Sec. 4604 of the Code, though there is a reason for the legislature to amend it so as to exclude the testimony of the mother in a case like this, and that of an agent making a contract for another with a deceased person. In both instances, death having closed the mouth of one of the parties to the transaction, the law might well close the mouth of the other. It has not done so, however, and we are of the opinion that the mother was competent to testify to the arrangement made with the Crisps.

III. Nor can it be said that the agreement was invalid because of including the homestead of the Crisps. In the first place, there was no evidence that they then had a home-

3. WILLS : oral
agreement to
make : home-
stead as affect-
ing validity.

stead; and in the second, if they had, there was nothing to prevent them from disposing of it after their death. The alleged contract neither imposed nor purported to impose any limitation upon their free use or disposal of any of their

property at any time during life. *Moline v. Carlson*, (Nebr.) 138 N. W. 721.

IV. Counsel for appellant contend, however, that all that was said prior to and at the time the articles were signed must be deemed merged therein and may not be shown as establishing an independent agreement.

4. EVIDENCE: articles of adoption: parol evidence to add to: admissibility.

That this is the rule with reference to ordinary contracts goes without saying. But this was not such. The statute, Sec. 3250, Code, prescribes who may adopt a child, "conferring thereby upon it all the rights, privileges and responsibilities which would pertain to it, if born in lawful wedlock to the person adopting."

Sec. 3252, Code: "Such instrument must also be signed by the person adopting, and be acknowledged by all the parties thereto in the same manner as deeds conveying real estate are acknowledged, and shall be recorded in the recorder's office in the county where the person adopting resides, and be indexed with the name of the parent by adoption, as grantor, and the child as grantee, in its original name, if stated in the instrument."

"Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth." Sec. 3253, Code.

These statutes prescribe precisely what is essential to accomplish adoption without reference to what other understandings may have been had between the parties. If others there may have been, they have no place in the articles of adoption as such, which aim only to put the minor in the same relation legally to the adoptive parents as though their offspring. Even this is not effected unless the instrument is recorded. *Tyler v. Reynolds*, 53 Iowa 146; *Shearer v. Weaver*, 56 Iowa 578; *Gill v. Sullivan*, 55 Iowa 341; *McCol-*

lister v. Yard, 90 Iowa 621. But as a parent may confer on another the legal right to the custody of his minor child, although adoption is not accomplished, adoption papers, though not recorded or somewhat defective, may prove effective for some purposes and are not to be regarded as entirely void. *Miller v. Miller*, 123 Iowa 165; *Fouts v. Pierce*, 64 Iowa 71; *Chehak v. Battles*, 133 Iowa 107.

Here, however, the instrument was prepared in strict conformity with the statute and with a view to recording, and therefore with the sole object of effecting adoption. It was not a contract within the meaning of the term, but the compliance in form with statutory provisions to effect legal adoption in the only manner possible. A writing merely in compliance with the statutes is not a contract, nor do these statutes undertake to authorize or regulate contracts. They are intended rather to give the right of inheritance, which does not arise from contract but from the law. *Jordan v. Abney*, (Tex.) 78 S. W. 486. But this was not effected, owing to the failure to record, and the purpose of executing the instrument was defeated and it rendered nugatory. It did not purport to deal with the property rights of parents, natural or adoptive, or with those of the child, and, aside from evidencing the yielding of its custody, it was of no efficacy whatever. To say, in these circumstances, that what was said at or preceding the drawing of such a paper was merged therein would be forcing the parol rule beyond the reason upon which it is based. It is only when the writing, construed in the light of the purpose for which executed, shows that it was meant to contain the whole bargain between the parties, that extrinsic proof of a distinct and separate oral agreement is held to be inadmissible. *Ingram v. Dailey*, 123 Iowa 188; *Sutton v. Griebel*, 118 Iowa 78; *Murdy v. Skyles*, 101 Iowa 549, 555; *Chicago Tel. Supply Co. v. Marne & Elkhorn Co.*, 134 Iowa 252.

Here the subject-matter of property was not touched in the written instrument, and therein the cause differs from

such cases as *Brantingham v. Huff*, 174 N. Y. 53 (95 Am. St. 545), in which the written agreement specified what the child was to receive upon attaining majority. As the writing before us failed in its purpose to effect adoption, through the neglect of the adoptive parents to record, those claiming under them ought not to be permitted to defeat the child's claim to the property under an independent agreement concerning a subject not touched in that writing. Oral testimony is not ordinarily excluded under like circumstances, nor a party denied the right to establish an oral contract by proof extrinsic of the written agreement. Such written agreement neither evidenced the adoption of plaintiff nor conferred on her the right of inheritance or claim to the property, and therefore did not relate in any way to the subject of the oral agreement. We are of opinion that the oral contract was clearly and fully proven, and that the objections to the evidence were rightly overruled.

The decree is—*Affirmed*.

WEAVER, GAYNOR and PRESTON, JJ., concur.

EVANS, J. (dissenting).—I. I am unable to concur in the majority opinion. I agree that the written instrument failed as an article of adoption because not recorded as required by statute. I agree also that such failure to record would not necessarily defeat all property rights which might otherwise have accrued to the plaintiff. I agree, under the authority of *Chehak v. Battles*, 133 Iowa 107, that, though such written instrument never became effective as an article of adoption, it was yet available to the plaintiff as a written contract and was specifically enforceable as such, as far as it purported to confer property rights. I do not agree that an oral contract can be superimposed upon it or that its terms may be contradicted or enlarged by parol evidence.

In the *Chehak* case, *supra*, the plaintiff was permitted to take under the written instrument the share of property which would have fallen to her if such written instrument

had been properly perfected as an article of adoption by acknowledgment and recording. The plaintiff was held to take not as an heir but under the contract according to its terms. At this point, there is no material distinction between the written instrument involved in the *Chehak* case and the written instrument involved herein. If, in the case before us, the Crisps had died intestate, then, under our holding in the *Chehak* case, the plaintiff herein could have taken the estate under the terms of the written instrument. Both in this case and in the *Chehak* case, however, the written instrument only purported to confer upon the child the same rights of property as if she were the natural child of the parties. No restriction was put upon the right of disposal of their property by the adopting parties in such way as they saw fit. The Crisps did dispose of it by will. The purpose of the parol evidence herein is to override the will and to put the plaintiff upon a higher plane of property rights than a natural child would occupy. To my mind, such parol evidence is clearly incompetent, as tending to vary the written contract. If such parol evidence is admissible in this case, it must logically follow that parol evidence will be admissible in any case of adoption. An article of adoption, though regular in all respects, will be equally subject to addition or diminution by parol evidence. If the failure to acknowledge the instrument in this case rendered the written instrument wholly nugatory, I could readily agree to the position of the majority that it could not then operate to exclude parol evidence. But under the *Chehak* case, it was nugatory only in the sense that it failed to become an article of adoption. It was not wholly nugatory. It was still available as a contract and subject to specific enforcement. If a contract, it was necessarily a contract in writing. If a regular article of adoption is immune from contradiction or variation by parol, it must be on the ground that it is in writing. Its immunity in that respect can be no greater than that of

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DEEMER, C. J.—I agree with EVANS, J., in the first para-
graph of his dissent, and with the majority on the second
division of the opinion, and consequently vote to reverse.

SALINGER, J.—I concur with EVANS, J., in his dissent.

RICHARDS & COMSTOCK, Appellant, v. HENRY E. FREDRICKSON
et al., Appellees.

PRINCIPAL AND AGENT: Evidence of Relationship—Sufficiency.

- 1 Evidence reviewed and held sufficient to show, in an action for
damages for misrepresentations in the sale of land, that the

party making the misrepresentations was the agent of the one owning and selling the land.

FRAUD: Fraudulent Representations—Action for Damages—

2 Scierter—Necessity to Show—How Shown. A demand, either in law or equity, for *damages* by reason of alleged fraudulent representations must be supported by evidence establishing (a) that the representations were *false* to the actual knowledge of the one asserting them to be true or (b) that the representations were *false* and, with the intent to deceive, were recklessly asserted to be true without knowledge whether they were true or false, or (c) that the representations were *false* and were made under any other condition which would be the equivalent of *scierter*. Evidence reviewed in an action for damages for false representations in a sale of lands and held to establish the *scierter*.

FRAUD: Damages, Measure of—False Representations as to Non-

3 existing Land. One who, in falsely representing the existence of land, pointed out what he claimed to be such land and estimated its value cannot object that the court, in assessing damages, adopted his estimate of the value, especially where there was other evidence that such estimate would have been correct had the land existed.

VENDOR AND PURCHASER: Vendee's Action for Possession—

4 Costs and Attorney Fees—Vendor's Liability. A vendor of land is not liable for court costs and attorney fees expended by the vendee in an unsuccessful action to remove from the premises one who claimed to be the tenant of vendor, the vendor having no notice of such action or opportunity to participate therein.

Appeal from Pottawattamie District Court.—HON. O. D.

WHEELER, Judge.

WEDNESDAY, JUNE 23, 1915.

REHEARING DENIED MONDAY, OCTOBER 4, 1915.

IN a suit to foreclose a mortgage, the defendant pleaded a counterclaim, and a balance, after cancelling the mortgage, was allowed thereon, and judgment entered accordingly. Plaintiff appeals.—*Modified and Remanded.*

Stout, Rose & Wells, and Tinley, Mitchell & Pryor,
for appellant.

Saunders & Stuart, I. J. Dunn, George S. Wright, Lysle I. Abbott, A. W. Askwith, for appellees.

LADD, J.—On November 30, 1911, the defendant, H. E. Fredrickson, made a written proposition to Richards & Comstock, a corporation, to exchange seventeen new and used automobiles, at prices aggregating \$22,300, for “444 acres of land and accretion lands adjoining said 444 acres and belonging to it,” described as “East 2/3 of Lot 1, and all of Lot 2 in Section 5, and all of Lots 3 and 4, in Section 4, all in Township 75, Range 44, Pottawattamie County, Iowa,” and as the difference in value, to “give back a mortgage on said deeded land to the amount of \$11,000 to run five years at 6% interest,” and “to receive Richards & Comstock’s share of 1911 crops.” On this was endorsed: “The above proposition is hereby accepted and we hereby deposit \$1.00 earnest money as required in this contract. (Signed) Richards & Comstock, By J. De F. Richards. Witness: S. S. Montgomery.”

The exchange was consummated in pursuance of this agreement by the delivery of the automobiles to Montgomery and execution of a warranty deed by Richards & Comstock of the 444 acres of land to Fredrickson, and a quitclaim deed to him of the accreted lands, and a mortgage in accordance with the terms by Fredrickson to Richards & Comstock. As the defendant failed to pay the interest on the mortgage at maturity, the plaintiff elected to declare the entire indebtedness due and instituted this suit praying that it be foreclosed. The defendant pleaded a counterclaim, in which he alleged that the plaintiff, through its agents, falsely and knowingly misrepresented that in the tract of land conveyed there were 444 acres of deeded land, and at least 750 acres in the entire tract, including the accreted lands; that there were in fact but 434.18 acres altogether, and that defendant made the exchange in reliance thereon and was deceived to his damage in the sum of \$11,500. In the second count, damages were claimed owing to the failure to obtain possession until one year later than agreed, and the expense of litigation in obtaining possession. The exchange was made on the plaintiff’s

part through one Montgomery, and the evidence leaves no doubt that he, by himself and through one Linn, represented that there were 750 acres of land in all,—that is, more than 300 acres of accreted land; that this was untrue and must have been known by them to be untrue; and that defendant relied thereon and was induced thereby to make the exchange for the land, when, had he known the truth, he would not have done so.

I. It is contended by appellant, however, that Montgomery was not authorized to act as agent of the plaintiff in what he did, and that plaintiff did not know that the representations were false. The deal was

1. PRINCIPAL
AND AGENT:
evidence of re-
lationship:
sufficiency.

negotiated by Montgomery ostensibly in behalf of Richards & Comstock, and the contract for exchange was made in their name.

Their signature was attached thereto by De Forest Richards, who, as Comstock testified, was their agent. Montgomery testified: "I had been handling this land for Richards & Comstock for at least two years previous to this and had the renting of it. Received verbal authority from both Richards and Comstock to represent Richards & Comstock, and received such shortly after they acquired the land." Though Comstock denied that Montgomery had authority other than for specified acts, he admitted "that probably every month for the last year I had some wildcat thing put up to me about it by him"; and testified that, about November 29, 1911, he received a dispatch from Montgomery making an offer of \$4,000 cash and a mortgage of \$11,000 on the land, bearing interest at the rate of 5%; that he objected that the rate of interest was too low; that Montgomery responded by fixing the rate at 6%; that he wrote Montgomery inquiring who was making the proposition and his responsibility; that he answered that he was taking a lot of automobiles and was to pay the money or have somebody do so for him; and that thereafter he requested a warranty deed of the deeded land and a special deed for the accretion; that he sent the deeds

and form of mortgage covering both for execution. As Fredrickson would not accept the last mentioned deed without some indication of the amount of accreted land conveyed thereby, Montgomery telegraphed Comstock: "Deal acceptable except they want added the following on quitclaim deed: 'Three hundred acres more or less.' This means nothing. There are more acres than this of accretion land. Shall I tell them that you will add this clause in the deed? Answer." Comstock responded: "Must have Stout's advice," and mailed a copy of Montgomery's telegram to Stout (his attorney), with this added: "I do not know how many acres of accretion land there is. Probably more than three hundred but I do not like to assert this with my indefinite information. If you say it is all right, however, of course I will do so. Kindly advise me."

Comstock testified that in accepting the proposition he was not aware of whose it was, that he knew nothing of the automobiles and supposed it was a cash transaction and that he wrote to Richards to go ahead and close the deal. Thereafter, Fredrickson and Montgomery went to Stout's office, and after some parley, there was inserted in the deed, following the phrase, "not the land itself, only the accretions," the words, "being three hundred acres more or less," and the deal was closed. From this it clearly appears that Comstock was fully aware that Montgomery was exchanging the land to Fredrickson, and was put on inquiry as to the representations made that the latter was giving the mortgage back and that Richards & Comstock were receiving the \$4,000 from Montgomery in lieu of automobiles. Moreover, Richards, through whom the papers were turned over, was fully informed that Montgomery was representing himself as their agent, and all of them knew that he was representing that there were 300 acres of accretions.

As Richards, conceded to have been plaintiff's agent, knew that the representations had been made by Montgomery,

though not personally knowing the facts, and that the exchange was induced thereby, it is not so material whether Montgomery was authorized to act as agent or not. That issue is fairly presented, however, and we are not inclined to interfere with the finding of the district court that he was so authorized.

II. Although the case was heard in equity, the demands in the counterclaim are for damages. In other words, the defendant, with knowledge of the facts, confirmed the ex-

2. FRAUD: fraudulent representations: action for damages: scienter: necessity to show: how shown.

change and elected to recoup in damages for any injury in consequence of the deceit practiced on him, and in such a case, *scienter* or its equivalent must be proven. *Sylvester v. Henrich*, 93 Iowa 489; *Clement v. Swanson*, 110 Iowa 106; *Boddy v. Henry*, 113 Iowa 462;

Hubbard v. Weare, 79 Iowa 678.

Appellant insists that there is no evidence from which it might be inferred that plaintiff knew that there were no accretions to the land other than the 444 acres of what was called deeded land. The record discloses that Montgomery pretended to point out to Fredrickson the alleged accretions (being a part of the 444 acres) and the boundaries of the farm, and especially the line between the accretions and the original lots. Fredrickson testified that he then represented that there were at least 300 or 350 acres of accretion and pointed out where these lay. Abbott, an attorney who had examined the abstract for the defendant, swore that at a meeting in his office, Montgomery, as well as Linn, positively represented that there were between 300 and 500 acres of accreted land, Linn putting the figures much higher. Tooser also testified to hearing the conversation in Abbott's office and other conversations at defendant's store, wherein Montgomery stated that there were 750 acres in the land. Montgomery denied making the representations and insisted that he told Fredrickson that he did not know how much

there was and testified that he in fact did not. De Forest Richards, who is conceded to have been acting for plaintiff, testified that he did not know the acreage, but thought Linn did. After Montgomery had showed the land to defendant, he referred him to Linn. The latter was equal to the occasion, as he stated there were fully 800 acres in the farm, that he had lived near by several years, had had it surveyed and knew where the stakes were. As there were but 434.18 acres, less than the deeded land as represented, and conditions had not materially changed for many years, and he was familiar with the premises, he must have been aware of the falsity of his statements. Indeed, the unanimity with which all concerned in the transaction referred to Linn raises the suspicion that this may have been by design. Enough of the record, however, has been recited to indicate that all knew of the representations' having been made, and Montgomery, the agent of plaintiff, of their absolute falsity. Others, as Richards & Comstock, though they may have been without knowledge thereof, were willing to proceed with the deal and avail themselves of its advantages, notwithstanding their knowledge of the representations, and their want of knowledge that there were accretions as represented. Appellant concedes that, if Montgomery was the agent of plaintiff in effecting the exchange, the latter was chargeable with his knowledge of the falsity of the representations made. If it be conceded, as Montgomery insists, that he did not know that there were any accretions to the land, it might well have been found that he recklessly stated that as true of which he had no knowledge, and so did for the purpose of deceiving and defrauding the defendant; and under these circumstances, as was held in *Davis v. Central Land Co.*, 162 Iowa 269, the plaintiff would be liable for the damages suffered in consequence of the deception practiced.

III. The court assessed, as part of the damages, \$12,000 for the 300 acres of land represented to be, but not included,

in the tract conveyed. The evidence, of course, could not well show the character of this land, but

3. FRAUD: damages, measure of: false representations as to non-existing land.

Montgomery pointed out what he claimed to be such land, and the plaintiff had the right to understand that the land would be of the character pointed out to him. In computing the value, Montgomery had estimated the 444 acres at \$75 per acre, and had said that there were fully 350 acres of accretion lands, and that that would figure out between \$35 and \$40 per acre for the entire tract. Necessarily, there is no evidence as to any difference in the land, and as plaintiff's agent had made this estimate and had pointed out a part of the deeded land as accretions, the court rightly assumed that the representation was that lands of about the character pointed out would be conveyed, and, therefore, that it would be worth the price estimated,—that is, \$35 or \$40 per acre.

Moreover, witness Mayne testified that there was “no real difference between the accreted land and the land that you call in place,” for the reason that they were in the same condition, and that it was difficult to distinguish between them. If the agent had not pointed out the land to be conveyed, it would be a different case, as there probably is much difference in different accreted lands. Having pointed out the land, however, and it being shown by the last mentioned witness that “all of this land that has vegetation upon it is worth about \$40 per acre,” the plaintiff is in no situation to complain if the estimate of the agent of \$35 or \$40 per acre shall be accepted.

Under the rule laid down in *Stoke v. Converse*, 153 Iowa 274, the measure of damages is the difference in the value of the property as it was and as it would have been if as represented. Here the land had no existence, but was represented to be as pointed out by Montgomery, and would be the reasonable market value of the land as so pointed out. We are of opinion that defendant should be allowed the lowest estimated value per acre for 300 acres, or \$10,500 as damages.

Under the terms of the exchange, the defendant was to have possession of the land March 1, 1912. One Lewis had been tenant and claimed to have leased the premises from Montgomery as agent of plaintiff for another year, and refused to yield possession. Thereupon, the defendant instituted an action of forcible entry and detainer in the justice court, and upon trial, Lewis was removed from all but 70 acres of land and defendant put in possession. On appeal to the district court, the action was again tried and reversed, the costs, amounting to \$66.15, being taxed against the defendant. The court included in its judgment these costs, and also an attorney fee of \$75, on the theory that there had been a breach of warranty, and the defendant was entitled to recover the costs and attorney's fee expended in procuring possession. For some reason, or because of neglect, Montgomery was not procured as a witness, and it is suggested that the result of the suit was owing to this omission. No notice of the pendency of the action was served on the plaintiff, and it had no opportunity to procure possession for Fredrickson nor to participate in said action in any way. This being so, and the issue being doubtful, we are not inclined to hold that recovery may be had of the expenses of litigation. *Yokum v. Thomas*, 15 Iowa 67; *Swariz v. Buiwa*, 47 Iowa 188; *Meservey v. Snell*, 94 Iowa 222; *Alexander v. Staley*, 110 Iowa 607.

The decree will be modified so as to exclude the costs and attorney's fees, and the damages reduced to \$10,500, and the cause will be remanded for that purpose. Each party will pay one half of the costs of this court.—*Modified and Remanded.*

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

4. VENDOR AND
PURCHASER:
vendee's ac-
tion for pos-
session: costs
and attorney
fees: vendor's
liability.

STATE OF IOWA, Appellant, v. L. M. OSBORNE et al., Appellees.

**CONSTITUTIONAL LAW: General Operation of Laws—Regulation
1, 3, 5 of Occupations—Classifications—Transient Merchant Act.**

The constitutional principle that "*all laws shall be general and of uniform operation throughout the state*" (Sec. 6, Art. 1, and Sec. 30, Art. 3, Const.) does not command that a statute designed to regulate or tax an occupation shall apply to *every* person engaged in the same general occupation. Such statute may provide any *natural* and *reasonable* classification by which some engaged in the occupation are amenable to the statute, while others are exempt. But the Constitution will not tolerate a manifestly unnatural, arbitrary or unreasonable classification.

PRINCIPLE APPLIED: The Transient Merchant Act (Secs. 700-c to 700-m, inc., Sup. Code, 1913) exacted a bond and license fee from such merchants and, in default thereof, provided for criminal prosecutions. The act was made applicable only:

- (a) To those who transacted such business within any city or town,
- (b) To those who transacted such business in an occupied or leased building, and
- (c) To those who had *not* previously conducted a mercantile business in the county.

Held, all three classifications were clearly arbitrary and unreasonable, being founded on no real difference between the occupation taxed and the occupations exempted.

**CONSTITUTIONAL LAW: General Operation of Laws—Arbitrary
2 Classification—Delegation of Power.** The legislature, being without power to adopt an unnatural, arbitrary and unreasonable classification in a statute designed to tax an occupation, is necessarily without the power to so shape the statute that a taxing official may do that which the legislature cannot do.

PRINCIPLE APPLIED: (In addition to No. 1.) The act was specifically made applicable to "*agents*"; yet in its exemption clause, "*selling agents in the usual course of business*" were specifically exempted from the operation of the act. The statute furnished no standard or guide to determine the distinc-

tion between the agent exempted and the agent not exempted, but such arbitrary determination rested solely with the taxing official. *Held*, such power cannot be constitutionally conferred on any officer or individual.

CONSTITUTIONAL LAW: General Operation of Laws—Regulation 1, 3, 5 of Occupations—Classifications—Transient Merchant Act.

CONSTITUTIONAL LAW: General Operation of Laws—Classifica-
4 **tions—Municipal Boundary Lines as Basis.** A classification, in a general state-wide taxation statute, not enacted for the benefit of cities and towns, cannot be constitutionally sustained when, thereunder, a certain occupation when carried on within the boundary lines of a city or town is made subject to the statute, but is exempt from the statute if carried on outside such boundary lines.

CONSTITUTIONAL LAW: General Operation of Laws—Regulation 1, 3, 5 of Occupations—Classifications—Transient Merchant Act.

CONSTITUTIONAL LAW: “Due Process”—Essentials—Notice—
6 **Hearing.** “Due process of law”, within the meaning of Sec. 9, Art. 1, Constitution, never means less than *some* prescribed course of legal proceedings in which the person adversely affected shall have an opportunity to be heard and to resist. *Held*, the Transient Merchant Act was violative of this clause of the Constitution.

PRINCIPLE APPLIED: A legislative act purported to tax or regulate the business of transient merchants. “Complaint” of a violation of the act could be made to the county auditor. If the dealer claimed he was a permanent merchant, the auditor was required to compel the dealer to do two things, to wit: (1) Give a bond conditioned to pay all claims growing out of the business and to pay the fee of a transient merchant if he did not continue the business one year, and (2) appoint the auditor his agent on whom service of notice of suits might be made. Who might make this “complaint” and how was not provided. *No hearing or notice whatever was provided. Held*, statute was void.

CONSTITUTIONAL LAW: Police Power—Exercising Power for
7 **Ulterior Purpose—Crushing Competition.** An ostensible exercise of the police power, for the evident purpose of destroying a useful business and thereby relieving others from troublesome competition, will be promptly condemned by the courts as unconstitutional. Transient Merchant Act condemned.

CONSTITUTIONAL LAW: Taxation—"Power to Destroy"—Occupation Tax—Right to Acquire Property. The undoubted power to tax harmless occupations does not embrace the power to destroy, either directly or indirectly. The inherent and constitutional right "to acquire, possess and protect property" (Sec. 1, Art. 1, Const.) must be respected. *Held*, Transient Merchant Act (Sec. 700-i *et seq.*, Sup. Code, 1913) was unconstitutional.

Appeal from Warren District Court.—HON. LORIN N. HAYS, Judge.

MONDAY, OCTOBER 4, 1915.

THE opinion states the case.—*Affirmed*.

John R. Howard, County Attorney, for appellant.

C. H. E. Boardman and *H. H. McNeil*, for appellees.

WEAVER, J.—The defendants were brought to trial upon an indictment for a public offense stated or described as follows:

"That the said L. M. Osborne and W. A. Tuttle, on the 20th day of September, A. D. 1913, in the county aforesaid, not being resident merchants therein, did unlawfully then and there engage in, do and transact a temporary or transient business in the city of Indianola, Iowa, as transient merchants by selling goods, wares and merchandise therein, to wit, buggies, on the aforesaid date, and did unlawfully for the purpose of carrying on such temporary business occupy a building in the said city of Indianola, Iowa, for the exhibition and sale of such goods, wares and merchandise, without having first obtained a license from the county auditor of Warren county, Iowa, authorizing them to engage in, do and transact business as transient merchants therein, contrary to the statute in such cases made and provided and against the peace and dignity of the state of Iowa."

The prosecution rested its case upon the following agreed statement of facts:

“That at the time complained of in the indictment the Marshalltown Buggy Company was a corporation whose principal place of business is Marshalltown, Iowa. That the defendant W. A. Tuttle is vice-president of said corporation and the defendant L. M. Osborne is secretary thereof and that said defendants were acting on behalf of said corporation as herein set out.

“That shortly prior to September 20, 1913, the defendant, W. A. Tuttle, on behalf of said corporation, employed one J. F. Schee, of Indianola, Iowa, to clerk a sale of buggies to be held at the Westerly Feed Barn in Indianola, Iowa, and to handle the paper received in payment thereof. That he caused to be inserted in the Indianola Herald, a weekly newspaper published at Indianola, Iowa, in their issue of September 18, 1913, an advertisement stating that the Marshalltown Buggy Company would offer at public sale on Saturday, September 20th, at the Westerly Feed Barn in Indianola, Iowa, two carloads of high grade vehicles. That he rented space in said feed barn for the storage, exhibition and for the sale thereof of said vehicles, said sale to be held on the 20th day of September, 1913. That two carloads of buggies were shipped by the said Marshalltown Buggy Company to themselves at Indianola, Iowa. That the said company paid the freight on said vehicles to Indianola, Iowa, and subsequently paid the Indianola Herald for the aforesaid advertisement.

“That said Marshalltown Buggy Company was not a resident merchant of the city of Indianola at that time, nor on the 20th day of September, 1913, but was at that time a corporation organized under the laws of the state of Iowa with its principal place of business and its factory at Marshalltown, Iowa, and engaged in a permanent and long established business at Marshalltown, Iowa. That on the 20th day of September, 1913, a demand was made by Tom Darnell, county auditor of Warren county, Iowa, upon said defendants that they procure a transient merchant's license before proceeding with said sale. That the defendants had no such

license and procured no license, and that the Marshalltown Buggy Company had no such license and procured no such license. That thereafter on the same day the said defendant, W. A. Tuttle, called upon one Fred Young, a resident dealer in buggies in Indianola, Iowa, and took him to the said Westerly Feed Barn where he inspected the said vehicles exhibited there by the said company. That the defendant L. M. Osborne was present when the said Young inspected the vehicles. That thereafter on the same day the said defendants, acting for the Marshalltown Buggy Company, sold the entire two carloads of buggies there exhibited to the said Fred Young by a certain instrument in writing, being Exhibit D, which is as follows: We hereby sell to F. C. Young, Indianola, Iowa, the twenty-three vehicles now located in Westerly Bros. Feed Barn, Indianola, Iowa, at sixty-five dollars each and two extra sets of buggy wheels at five dollars per set. Total, \$1,505.00. Terms cash or bankable note.

“Marshalltown Buggy Company,

“W. A. Tuttle, Vice-President.

“Accepted. F.C. Young—Dated Indianola, Iowa—Sept. 20-13.

“That thereafter, on the same day, the said Young proceeded with said sale as advertised, having first stated at the opening thereof that he had purchased the entire stock of buggies there exhibited by the Marshalltown Buggy Company. That the said defendants assisted in said sale by stating at the opening thereof a history of their company, their sales, and describing the workmanship of said vehicles. That they advised the clerk thereof how to tell and how to keep the stock number of said sale. That at the conclusion of said sale, they advised the clerk as to the amount due the proprietor of said feed barn, which the clerk then paid, and that the auctioneer was then paid one per cent by the clerk as the amount which had been promised by them. That at the conclusion of said sale they went to the harness shop of said Young and there he was credited with the amount of the pro-

ceeds of said sale by the banker who clerked the sale, less the amounts above set out and the clerk's commission and the said banker there certified the check of the said Young for the sum of \$1,287.28, which was delivered to said defendants, payable to the Marshalltown Buggy Company."

At the close of the state's case, the defendants moved for a directed verdict of not guilty, on grounds which may be abbreviated as follows:

1. That the evidence offered is insufficient to sustain a conviction; and

2. That the statute, Ch. 62 of the Acts of the Thirty-fifth General Assembly, with a violation of which the defendants are charged, is unconstitutional and void in that (1) it is not of uniform operation and provides for an unreasonable and arbitrary discrimination in its application and enforcement, contrary to the provisions of Sec. 30 of Art. 3 of the Constitution of the state of Iowa; (2) it provides privileges and immunities for certain citizens which it denies to other citizens upon the same or equal terms, and deprives those against whom it is enforced of their liberty and property without due process of law, contrary to the provisions of Secs. 6 and 9 of the Bill of Rights embodied in the state Constitution; and (3) said statute violates the fourteenth amendment to the Constitution of the United States, in that it denies the equal protection of the law to persons prosecuted for its alleged violation.

The trial court sustained the motion, a verdict of not guilty was accordingly directed, and the defendants were discharged. The state appeals.

The statute, the validity of which is thus put in issue, provides in Sec. 1 thereof that it "shall be unlawful for any temporary or transient merchant to engage in, do or transact any business as such within any city or incorporated town without first having obtained a license" therefor.

Sec. 2 makes it the duty of every temporary or transient

merchant desiring to transact business in any county of this state to file an application for license in the county auditor's office, stating his proposed place of business, the kind of business and the time for which he desires the privilege. He shall also pay to the treasurer of the county a license fee of \$200, taking duplicate receipts therefor. One of these receipts he must file with the county auditor, together with the bond hereinafter mentioned, and thereupon the auditor will issue the desired license.

Sec. 3 provides that before the license issue, the applicant shall deliver to the auditor a good and sufficient bond with approved sureties in the amount of \$1,000, conditioned for "the protection of all persons, firms or corporations who may have claims against the obligor arising out of said business and any such person, firm or corporation may sue thereon in his or its own name." The applicant must also deliver to the auditor, with the bond, "a duly executed instrument making the county auditor the agent of the obligor for the purpose of being served with original notice of suit on said bond."

Sec. 4 prohibits the transient merchant from advertising or representing the goods which he offers for sale "as being sold as an insurance, bankrupt, railway wreck, insolvent, assignee, trustee, executor, administrator, receiver, syndicate, wholesale, manufacturer or closing out sale, or as a sale of goods damaged by smoke, fire, water or otherwise," unless such dealer shall first file with the auditor a sworn statement showing where and of whom he obtained the goods, the place from which the goods were last taken "and all details necessary exactly to locate and fully to itemize all goods, wares and merchandise so to be advertised and represented." A false statement in any of these respects is made punishable as perjury.

Sec. 5 defines the words "temporary or transient merchant," making them applicable to "all persons, firms or corporations who engage in, do or transact any temporary or

transient business, either in one locality or more, or by traveling from one or more places in this state, selling goods, wares or merchandise and who, for the purpose of carrying on such business, lease or occupy a building, structure or car for the exhibition and sale of such goods, wares or merchandise."

Sec. 6 provides that "Whenever it appears that any such goods, wares and merchandise have been brought into any county in this state by a person, firm or corporation who has not previously conducted a merchandise business therein, and it is claimed that such stock is to be sold out at reduced prices, such facts shall be prima-facie evidence that the person so offering such goods for sale is a transient merchant."

Sec. 7 provides that, if complaint be made to the county auditor that any person doing business in any city or incorporated town within the county is a transient merchant and such person shall claim to be a permanent merchant, the auditor shall require him to furnish a bond with approved sureties in the sum of \$1,000, conditioned to pay the license fee of \$200 in the event that he does not continue in the business which he is conducting in such city or incorporated town for a period of one year from the time when such business was started. The bond must also stand for the protection of all persons having claims against the obligor arising out of said business as provided in Sec. 3. This section concludes with the following: "But after such merchant has been conducting the particular business in which he engaged in such city or incorporated town for a period of one year, he shall be held to be a permanent merchant and this act shall no longer be applicable to him."

Sec. 8 exempts from the operation of this statute commercial travelers, selling agents in the usual course of business, public officers selling property under authority of law, and "any person selling farm and garden products."

Sec. 9 provides that this act shall in no way limit the authority of any city or town to exact payment of license from transient merchants desiring to do business therein,

and declares that the "requirements of this act shall be in addition thereto."

Sec. 10 directs that license collected under the authority of this act shall be paid into the general revenue fund of the county; and

Sec. 11 makes the violation of the provisions of the act a misdemeanor, upon conviction of which the person so offending "shall forfeit and pay into the county treasury, in addition to the penalty imposed therefor, double the amount of the tax for one year, as fixed by Sec. 2."

The extraordinary character of this statute justifies the expenditure of time and space we have given to the statement of its several provisions. Moreover, the objections raised thereto on constitutional grounds can be properly disposed of only upon due consideration of the act in its entirety. Of the authority of the legislature to provide for the regulation of business by transient and itinerant dealers, there can be no reasonable question. Nor is there room to doubt that a measure of such authority has been delegated to cities and towns organized under the laws of the state; but in this, as in most other respects, the power of the state and of its municipalities is circumscribed by constitutional limitations. We have, then, to consider whether this statute is open to any of the objections raised by the appellee.

In the exercise of the admitted authority to which we have already adverted, the legislature ordinarily has discretion to select and classify the occupations or the kinds of business for which license fees or occupation taxes shall be exacted and the courts will not undertake to review or nullify such action of the lawmaking body unless it clearly appears that the classification made is unnatural or arbitrary and unreasonable and founded on no real difference between the occupation taxed and others exempted from its burdens. See *State v. Mitchell*, 97 Me. 66 (94 Am. St. 481) and cases there cited.

Assuming a valid classification to have been made, then

the tax or license exacted must be uniform and bear equally upon each individual or person or kind of business coming within that description. Constitution of Iowa, Art. 1, Secs. 1 and 6; Art. 3, Sec. 30. See also the comprehensive citation of authorities in note to *Hager v. Walker*, 129 Am. St. R. (Ky.) 238, 250.

So, too, if the occupation be one of harmless character or one which is admittedly useful, the license fee imposed must not be so exorbitant or oppressive as to be prohibitive of its pursuit or to create a monopoly for the benefit of a favored few. *Kendrick v. State*, 142 Ala. 43; *Morton v. Mayor*, 111 Ga. 162; *State v. Moore*, 113 N. C. 697; *State v. Santee*, 111 Iowa 1, 4; note to *Hager v. Walker*, 129 Am. St. R. 238, 260; *Iowa City v. Glassman*, 155 Iowa 671. And this is especially true where the burden laid upon a particular business or occupation is not imposed in the exercise of the taxing power for the purpose of revenue, but is rather an assertion of the police power which has its justification only in the inherent authority of the state to provide reasonable regulations "to promote the health, comfort, safety and welfare of society." Cooley's Constitutional Lim. (6th Ed.) 704.

The weight of authority is to the effect that a license fee enacted as a police regulation for an occupation or business which is not of itself harmful or demoralizing must have some fair relation to the cost of making and issuing the license and the expense of police supervision and protection. *Wisconsin Telephone Co. v. Milwaukee*, 126 Wis. 1; *Robinson v. City of Norfolk*, (Va.) 60 S. E. 762; *Postal Co. v. Taylor*, 192 U. S. 64 (48 L. Ed. 342); Tiedeman on Police Powers, p. 274.

When, therefore, it is clearly evident that an act sought to be justified as an exercise of the police power is not in fact intended as a regulation, and that its real purpose—no matter what verbiage is employed to conceal it—is to raise revenue or to accomplish some ulterior effect not within the legitimate province of legislation, the courts will hold it

to be unauthorized and void. *Iowa City v. Glassman*, 155 Iowa 671. See cases above cited. It may further be added, without here elaborating upon the proposition, that the manner and method provided for the enforcement of such an act, whether it be intended merely to provide revenue or to establish a police regulation, must be consistent with due process of law.

Passing, then, to the statute here in question, let us first consider the objection made thereto that it is arbitrary and unreasonable and that the license imposed is unequal in its

burdens and discriminating in character. The requirement in Sec. 2, that "any transient merchant" desiring to do business in any county must first procure a license, pay a fee and give a bond, is clear and comprehensive and gives no hint of discrimination, and if

this were all, it would doubtless be well within the authority of the legislature, unless we should find the amount of fee required and the exaction of a bond to be so manifestly arbitrary and excessive as to defeat its purpose. But when we go farther, and examine Secs. 1 and 5, we find that the provision which before was broad enough to include every transient merchant seeking to do business in the state is restricted to transient merchants in cities and towns, and then is still further narrowed down to persons engaging in such occupations "*who for the purpose of carrying on such business hire, lease or occupy a building, structure or car for the exhibition and sale of such goods.*" In other words, the effect of the general provision is thus so narrowed that the gist of the offense is not in doing business as a transient merchant within the county, but in hiring, leasing or occupying a building, structure or car for the purpose of carrying on such business. Giving literal effect to this provision, if the defendants should bring a dozen buggies from Marshalltown to Indianola and without procuring a license sell them from a shop or building engaged for that purpose, they would be

guilty of a punishable misdemeanor; while a competing dealer coming from Des Moines to the same town with an equal number of buggies and selling them from a vacant lot hired or leased for that purpose would be guilty of no offense at all. That this distinction is arbitrary and unreasonable is too clear for argument. In the illustration we have used, the business transacted by the dealer from Marshalltown and that transacted by the dealer from Des Moines is in all essential respects identical, and no reasonable ground can be assigned for saying that one is a transient merchant and the other is not. *Chaddock v. Day*, 75 Mich. 527; *State v. Wagener*, 69 Minn. 206; *Leonard v. Reed*, 46 Colo. 307; *State v. Parr*, 109 Minn. 147.

Again, after describing the class of persons or dealers required to obtain the license as including all temporary or transient merchants, and after making the term applicable

2. CONSTITUTIONAL LAW: general operation of laws: arbitrary classification: delegation of power. to "all persons, firms and corporations both principal and agent who engage in, do or transact any temporary or transient business either in one locality or more, or by traveling from one or more places in this state selling goods, wares or merchandise," the act expressly excepts from its operation the selling of goods by "commercial travelers" and by "selling agents in the usual course of business," also the selling of "farm and garden products." No standard is given or fixed by which the officer issuing the license may differentiate with any certainty between the "agent" who, by Secs. 2 and 5, is forbidden to transact a temporary business without a license and the "selling agent" who, by Sec. 8, is exempted from such obligation. A traveling or transient merchant may employ an agent to sell his goods, wares or merchandise and, in exercising the authority thus conferred upon him, the agent is as certainly a "selling agent in the usual course of business" as if he were doing the same service for a permanent merchant. The statute as written leaves it open to the licensing officer to arbitrarily

draw a line or make a discrimination between agents or salesmen of the same essential kind and character, and this, we think, is a power which cannot be constitutionally conferred upon any officer or individual. *Yick Wo v. Hopkins*, 118 U. S. 356; *State v. Hoyt*, 71 Vt. 59; *Noel v. People*, 187 Ill. 587; *State v. Mitchell*, 97 Me. 66. It is also open to question whether the exemption of transient dealers in farm and garden products is not an improper discrimination, but our conclusion that the statute is otherwise fatally defective renders it unnecessary that we now take time for its discussion. But see *State v. Wagener*, 69 Minn. 206; *Connolly v. Union S. Pipe Co.*, 184 U. S. 540, 564; *Brown v. Jacobs*, 115 Ga. 429; *State v. Garbroski*, 111 Iowa 496.

It is further to be noted that the regulation which is here sought to be enforced is not one imposed by a city or town, and thus limited in its effect to business done in municipal

8. CONSTITUTION-
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corporations. It is enacted as a general statute by the legislature, but limited in its application to persons doing a transient business in cities and incorporated towns, while expressly preserving to such municipalities all their statutory powers of license and regulation. It

discriminates, however, between transient dealers who do business in towns and those who do not. Were this regulation one provided by a city or town ordinance, such discrimination would be natural and necessary; for, generally speaking, the authority of the city to legislate is restricted to its own territory: but whether the general assembly, legislating for the whole state, may impose an occupation tax or license discrim-

4. CONSTITUTION-
AL LAW: gen-
eral operation
of laws: class-
ifications:
municipal
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as basis.

inating between two persons doing precisely the same kind of business, taxing the one heavily and entirely exempting the other, because the boundary line of a city or town happens to pass between their places of business, is not

so clear. See *Hager v. Walker* (Ky.) 107 S. W. 254. That it would be competent, under our Constitution, for the legis-

lature to impose an occupation tax upon a specified class of merchants or professional men in certain counties of the state and exempt all others therefrom, no one will contend. Is the law any less repugnant to the constitutional inhibition of local legislation because, instead of restricting it by county lines, its operative effect is limited to cities and towns? If the law were ostensibly or in fact enacted for the benefit of cities and towns, it is possible that this objection might lose some of its force; but such is clearly not its purpose. No authority or power is given the municipality which it did not before possess. The officers of the city are charged with no duty or responsibility with respect to its enforcement. The license paid goes wholly to the general fund of the county. No police protection or supervision is prescribed. No regulation is provided as to the manner or method in which a licensee shall conduct his business. It is, upon the surface at least, nothing more nor less than a general provision for the levying of a license or occupation tax, not upon all transient merchants, but upon that portion of the class so designated which undertakes to do business in cities and towns. If it be expedient or proper to levy such a tax for state purposes, there is no reason apparent to the court or suggested by counsel in argument why it should not be subject to the fundamental rule that the burden of the tax should be imposed equally upon all coming naturally and fairly within the described occupation.

Still another discrimination is seen in Secs. 6 and 7, where, as we have already noted, it is provided that "when-

ever it appears" that a stock of goods has been brought into any county by a person "*who has not previously conducted a merchandise business therein*" and "it is claimed that such stock is to be closed out at reduced prices," such fact shall be prima-facie evidence that such person is a transient merchant. In other words, if two competitors in this line of business bring into the county two stocks of

5. CONSTITUTION-
AL LAW: gen-
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goods of the same general character, which they place in adjoining store buildings, and offer them for sale at reduced prices, and it further appears that one of them has at some previous time conducted a mercantile business in that county, while the other has not, then the latter (if the statute be valid) is required to procure a license and give a bond for the benefit of his customers and, upon failure to do so, may be prosecuted and convicted and be made to suffer as a criminal, while the former is subject neither to license fee nor penalty of any kind. The absurdity of the proposition and the gross injustice of such a rule of law is too apparent upon its simple statement to require discussion. If such discrimination is not unnatural and unreasonable and such enactment be not class legislation of the most obvious character, then the constitutional guaranties of personal and property rights may well be said to have become obsolete.

Coming now to the objection that the statute contravenes the constitutional guaranty of due process of law and of life, liberty and property, we turn to the provisions of

6. CONSTITUTIONAL LAW: "due process": essentials: notice: hearing.

Sec. 7. It is there provided that, upon complaint to the county auditor that any person is doing business as a transient merchant in any city or town of such county, the auditor shall require of such merchant, and he shall furnish, a bond in the sum of \$1,000, conditioned that, if he does not continue in the business in which he is engaged in such city or town for the period of a year, he shall pay the license fee and all claims arising against him growing out of said business; but if he shall continue to conduct the "particular business" in which he is then engaged for a period of one year, he shall then be held to be a "permanent merchant," and no longer liable to the tax. There is no requirement as to the person or persons entitled to make the complaint, nor that it shall be in writing, nor that it shall be verified by the oath of any person. It provides for no hearing or notice, or opportunity of defense. The only recourse of the person of whom the de-

mand is made is to quit business or to pay the fee of \$200 and give the required bond, or to give a bond to secure such payment until, by a year's continuance in the same business in the same place, he has acquired the right to call himself a "permanent merchant." Failure to give the bond is a violation of the statute which subjects him to an onerous fine. Even though he be in fact a lifelong resident of the place and a veteran merchant in the town or city, yet, upon the simple unverified complaint of any person to the county auditor that he is a transient, he may thus be deprived of the right to transact his ordinary business, or be kept under bond and subjected to the inquisitorial interference of the auditor without any adequate remedy for the wrong so inflicted. The constitutional right to life and liberty and to acquire, possess and enjoy property is not a mere glittering generality without substance or meaning. It includes the right to pursue a useful and harmless business without the imposition of oppressive burdens by the lawmaking power, subject, of course, to the sovereign right of the state to lay thereon the ordinary burdens of taxation, assessed and collected according to the established forms of law, and to such reasonable regulations as the peace, comfort and welfare of society demand. Due process of law does not necessarily mean judicial proceedings in all cases, but it never means less than some prescribed course of legal proceedings in which the person adversely affected shall have an opportunity to be heard and to resist, if he be so advised. Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision. *People v. Otis*, 90 N. Y. 48. To take from property its chief element of value and deny to the citizen the right to use and sell or transfer it freely in any proper and legitimate method is as much depriving him of his property as if the physical property itself were taken. *Bank v. Divine Grocery Co.*, 97 Tenn. 603.

So, too, we are of the opinion that to impose oppressive and unequal burdens upon the buying and selling of goods,

conditions which necessarily hamper the merchant in his business and take away or diminish the profitable employment of his labor or capital is an unconstitutional taking of his property, and that such exactions are not cured or legalized by affording him the option to give a bond and prove his non-liability to the wrongful demand by a specified course of conduct in the future. If he gives the bond in this case, he deprives himself of the right to sell and dispose of his stock and enter any other business for an entire year; otherwise to subject himself to the payment of a license fee with which he is not legally chargeable. Such an exaction by an administrative officer has none of the characteristics of a legal proceeding and is in no proper sense due process of law.

We have said enough to indicate the necessity of affirming the judgment below, but we think it proper to add that it is perfectly manifest, from a reading of the entire statute,

<p>7. CONSTITUTION- AL LAW : po- lice power : ex- ercising power for ulterior purpose : crushing com- petition.</p>	<p>that the ultimate purpose sought to be accomplished by its provisions was neither to raise public revenue nor to hedge the business of transient merchants with police regulations for the public benefit, but rather to relieve</p>
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the so-called permanent merchant of the more or less annoying competition of the transient merchant. The plan is laboriously wrought out and is couched in terms phrased to avoid, if possible, the fate which has overtaken many other statutes of similar design when brought to a judicial test. Whatever may be the justice of the complaint that the transient merchant does not pay his share of the taxes, the remedy is not to be found in outlawing him or destroying his business or by creating a monopoly for the resident merchant. Assuming that both lines of business are honestly conducted, one is as legitimate as the other and entitled to like protection, and the law should not be converted into a weapon by which either competitor may annihilate the business of the other. Speaking upon this question, the Michigan court has well said: "It is quite common in these latter days for cer-

tain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts, and be only upheld when it is strictly within the legitimate power of Congress or the state or municipal legislatures.” *Chaddock v. Day*, 75 Mich. 527.

In conclusion, we repeat what we have already suggested: that the power of the state to tax and regulate different occupations and lines of business is not to be denied.

8. CONSTITUTIONAL LAW: taxation: “power to destroy”: occupation tax: right to acquire property.

It is also true that the courts have sometimes said “the power to tax is power to destroy”; but, as is usual with all general propositions, this concession may be overworked. The power to tax cannot lawfully be carried to an extent to destroy rights or privileges guaranteed by the Constitution. The first section of our Bill of Rights assures to every man protection in his natural right to acquire, possess and enjoy property. This necessarily includes the right to buy, sell and exchange; and, in so far as the traffic is of a harmless and useful character, the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless. For example, if the legislature should impose an occupation tax of one thousand dollars per year upon every market gardener or farmer or carpenter or grocer or telegraph operator or washerwoman, no court would hesitate to say it was an unconstitutional abuse of power. The power and discre-

tion of the legislature are broad, but they are not illimitable; and while we will be slow to invalidate a statute enacted in due form, we will not hesitate so to do if the unconstitutionality of the act is patent. Nor is the constitutional protection of the common and universal right to life and liberty and to the acquirement, use and enjoyment of property to be avoided by calling an exorbitant and prohibitive tax a license fee imposed as a police measure. The police power is not superior to the Constitution, and police regulations of a business not of a dangerous character which amount to undue restraint or prohibition will not be sustained. *State v. Ashbrook*, 154 Mo. 375; *Chicago v. Netcher*, 183 Ill. 104; *State v. Moore*, 113 N. C. 697.

The Kentucky Court of Appeals, while conceding that the amount of property tax to be imposed in the general power of taxation is vested exclusively in the legislature, proceeds to say, "But this unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations or professions, and the courts . . . have the undisputed right to determine whether or not a legislative act is in violation of the Constitution, although its purpose may be the raising of revenue." *Hager v. Walker* (Ky.) 107 S. W. 254.

In short, the right of the state to impose an occupation tax or license fee upon harmless and useful lines of business is to be exercised with due regard to the natural and constitutional right of every individual to pursue an honest calling and have and enjoy the benefits of his own labor and be secure in the use and enjoyment of his own property.

There are many other questionable features of this statute, some of which are discussed by counsel, but those to which we have given attention are sufficient to dispose of the appeal. The trial court did not err in holding the enactment void and refusing to enforce it. The judgment below is—*Affirmed*.

All the Justices concur.

HARRY ELMER STICKLES, Appellee, v. FRANK EARL TOWNSEND
et al., Appellants.

WITNESSES: Attorney as Witness—Duty to Withdraw from Case.

- 1 The Supreme Court "much prefer that counsel should not testify as a witness unless it is necessary, and that they should then withdraw from the active management of the case."

DEEDS: Delivery—Evidence—Sufficiency. Evidence reviewed and

- 2 held to sufficiently establish the delivery of a deed to grantee.

DEEDS: Delivery—Inability of Grantor to Recall. A deed once

- 3 delivered cannot be recalled without the consent of the grantee.

Appeal from Greene District Court.—HON. M. E. HUTCHISON,
Judge.

MONDAY, OCTOBER 4, 1915.

ACTION in equity to quiet and establish title to an undivided one sixth of 164 acres of land, and a lot in the town of Jefferson, plaintiff's title to the lot being subject to a life lease in Theresa Jane Townsend. Plaintiff, who is the appellee, based his claim of title upon a certain conveyance executed by the first three named defendants, who are the children and devisees under the will of Reece Townsend, deceased. The deed bears date July 10, 1906. The children named were, prior to said conveyance, the owners in fee of a two-thirds interest in the real estate. The defendants, except Theresa, filed answer denying all allegations of the petition, but admitting the execution of the instruments upon which plaintiff's claim is based; they denied that delivery of same was made as alleged and claimed that there had never been a delivery to plaintiff. The trial court found in favor of plaintiff, and a

judgment and decree was rendered, granting plaintiff the relief prayed. Defendants appeal.—*Affirmed.*

Church & McCully and A. D. Howard, for appellants.

H. W. Spangler and J. A. Henderson, for appellee.

PRESTON, J.—There is no serious dispute between counsel as to the law of the case, and the question presented is almost entirely one of fact. Many of the facts are not disputed. The determination of the case turns on the question as to whether there had been a delivery to plaintiff of the deed which it is admitted the three other named children of deceased executed. Plaintiff contends that the deed and assignment of the one-sixth interest in the personal property were sent to him at Denver, Colorado, by A. D. Howard, who is one of the attorneys for appellants, and who was also temporary administrator and administrator with the will annexed, and who, plaintiff claims, was acting for plaintiff in this matter. It is also claimed that plaintiff returned the deed and assignment to Howard with directions to record the same. He claims that he did not know of the alleged or so-called escrow papers which defendants claim they left with Howard at the time the deed and assignment were placed in Howard's hands; and he claims that said escrow paper is an afterthought. Defendants contend that, at the same time that the deed and assignment were executed and placed in Howard's hands, they also executed and placed with him a paper, the substance of which is that the deed and assignment were not to be delivered to plaintiff until they should so direct; they contend that Mr. Howard did not send the papers to plaintiff, or if he did, he was not authorized so to do, and that, therefore, there was no delivery. Their claim now is that plaintiff, who is their half brother, was addicted to gambling and that their purpose in executing the deed and assignment was to induce plaintiff to "straighten up", as they put it, and that if he did so, the papers were to be then delivered to him. The

three defendants, grantors in said deed, and their attorney, Mr. Howard, so testify over plaintiff's objection. A strong circumstance, in our opinion, against defendants' contention at this point is that neither the deed itself nor the so-called escrow paper refer to such a matter. Some of the grantors testify that the reason they did not want the deed delivered was that plaintiff and defendant Ross Townsend had lost too much money in a business venture in which they were engaged together in Colorado a year or two after Reece Townsend died, although they attempt to explain and qualify their testimony so given. There is but little evidence in the record that plaintiff was a gambler. One of the defendants testifies that he saw him gamble, but we do not find that any date was fixed.

1. WITNESSES :
attorney as
witness : duty
to withdraw
from case.

One of the attorneys for defendants, testifying as a witness, said that plaintiff had admitted it to him. We might say here that on the really vital points in the case the defendants rely almost entirely upon the testimony of their attorney, who was a witness, and who continued in the active management of the defense in the district court, and who has made the argument in this court.

We do not wish to criticise too harshly ; but under such circumstances, we much prefer that counsel should not testify as a witness unless it is necessary, and that they should then withdraw from the active management of the case. It is human nature for attorneys to be intensely interested in the result of their client's case.

As bearing upon this point, we may state that appellants' abstract contains 74 pages and there is an additional abstract of 65 pages. Substantially every page of the abstract is corrected, and there is no denial of appellee's abstract. The entire deposition of one material witness is omitted from the abstract. The argument for appellants is made without regard to the corrections in the additional abstract.

The plaintiff is a son of defendant Theresa Jane Townsend, by a former husband. Defendants Frank, Ross and Elda

are her children by deceased, Reece Townsend, who died July 1, 1906, seized of the real estate described.

2. **DEEDS : delivery : evidence : sufficiency.** Deceased died testate, but his will made no provision for plaintiff except upon a contingency which did not happen. The will gave to his widow, Theresa, one third, and the undivided two thirds to his three children, Frank, Ross and Elda, share and share alike. The plaintiff had lived in the family for about twenty years, and since he was fifteen years of age, and, as we understand it, claimed to have had some agreement that he should receive a share of the estate, and threatened to contest the will on that ground. He was dissatisfied that he would get nothing under the will.

By direction of the three devisees, Mr. Howard prepared a deed of conveyance, absolute in form, to an undivided one-sixth of the real estate of which deceased died seized, but as to the lot in town,—the homestead,—subject to a life estate. This deed contains this provision: “and, whereas, it is the desire of the said Frank Earl Townsend, Ross M. Townsend, and Elda Townsend, that their brother, Harry Elmer Stickles, should own a part of the real estate belonging to said estate, and that he should receive an equal share therein with the said legatees under said will . . . this conveyance of said one-sixth interest is made to the said Harry Elmer Stickles for the purpose of making him an equal owner with the grantors in the undivided two-thirds of said real property that is left to the grantors under said last will and testament of the said Reece Townsend, and for no other purpose.” This deed bears date July 10, 1906, and was signed by all the grantors named and was duly acknowledged July 14, 1906. At the same time, an undivided one-sixth interest in the personal estate was assigned by the same parties and a life lease from the three children and devisees before named was executed for the homestead, which contains the following recital, among others: “And it is further agreed that in consideration of this life lease to our said mother that said home shall remain

as it now is until the death of the said second party, at which time said home shall become the sole property of Frank Earl Townsend, Ross M. Townsend, Elda Townsend, and Harry Elmer Stickles, each to share and share alike." Defendants contend that the escrow paper before referred to was executed at the same time. As stated, this last proposition is denied by plaintiff, who says he never heard of it until a year or two afterwards, and there are other circumstances in the case indicating that there was no such paper delivered to Howard until after plaintiff had returned the deed to Howard for recording. We shall not now attempt to refer to all these circumstances, but content ourselves with stating that, from the entire record, which we have examined with care, the weight of the evidence is against the contention of defendants that such an instrument was executed and placed in Howard's hands at the time the deed and assignment were given to Howard. The circumstances, or some of them hereinafter referred to, have a bearing upon this point. There is a conflict in the testimony as to whether plaintiff was present at the time the deed, assignment and lease were made. Plaintiff claims that after the funeral he returned home before any of the papers were drawn. On July 22, 1906, or eight days after the papers were acknowledged, he wrote a letter to A. D. Howard from Denver, Colorado, in which he stated:

"Mr. Howard, I suppose my brothers and sister have signed those papers and it was so good of them and I wish to ask you if those papers are binding or could it be taken away again should anything happen. I write you as I am very much interested. I would like you to let me know of anything that concerns me and if possible send me a copy of the papers they signed. I would not like for you to speak of this part of the letter as they might think I was a little hasty, but you know it was to my interest."

Plaintiff claims that he received the original deed in controversy and the assignment of the personal estate and that

they were in a letter from Mr. Howard dated July 25, 1906, which reads as follows:

“I enclose you herewith the papers signed by your brothers and sister, conveying to you an equal share of the estate belonging to your father, Reece Townsend. This makes you an equal owner with the others, in the estate, after the will is probated, and then the deed should be recorded. I send you these that you may know what has been done and they are now irrevocable, and you will be an equal owner with them as soon as the will is probated. You had better return them to me to keep until the proper time, and I will then have the deed recorded for you, and have the executor accept notice of the other.”

Mr. Howard denies sending such a letter and denies that he sent the original deed and assignment, but says that he sent only copies of the instruments and produces what he claims is a copy of the letter he did write. There is a serious conflict in the evidence as to whether Mr. Howard did send a letter of July 25, 1906, as claimed by plaintiff. It is referred to in the record as Exhibit A, and the contention of plaintiff is that the original of such letter was attached to his first deposition, taken in Denver, Colorado, and marked Exhibit A.

August 19, 1906, plaintiff wrote Mr. Howard from Denver, as follows:

“Mr. Art Howard, Dear Sir: I wish to thank you very much for sending me those papers and also for the good work you have did for me and I will return them at once. I should have sent them to you before this, but I have been so busy and have neglected to do so. You will have them recorded and attend to my part of the business and what expense there is attached I will gladly settle. I know that you will see that everything is done according to law. It was very good of my brothers and sister to remember me as they have and I am very thankful for it. You will find those papers

and keep me posted. Respectfully, your friend, Harry E. Stickles.”

This letter is marked Exhibit EE. Mr. Howard as a witness says: “This letter ‘EE’ came back with these papers when he returned them to me.” But, as stated, Mr. Howard claims that these were copies of the deed and assignment, while plaintiff claims they were the originals, and that, after he had himself made a copy, he returned the originals to Howard for recording.

Plaintiff testifies as a witness:

“I accepted this deed when received through the mails as a conveyance of the property it purported to convey. I thought I owned this property for two years after I received the deed. I never told A. D. Howard to withhold the deed from record. I would have sent the deed to the recorder’s office myself and had it recorded if it hadn’t been for Howard requesting me to send the deed to him and he would record it.”

Going back to the question as to whether there was an Exhibit A, a letter from Howard to Stickles, dated July 25, 1906. The deposition of Stickles, to which the original letter marked Exhibit A was attached, was filed in the clerk’s office about one P. M., November 8, 1912. Notices were sent of the filing, and Mr. Howard went to the clerk’s office about one P. M., November 9th, and made an explanation of the deposition with the clerk when it was found that the letter referred to in the evidence as Exhibit A was missing. Thereafter, considerable testimony was taken as to the letter. As stated, defendants deny that such a letter was sent; but it is the claim of defendants that, if such a letter existed and was attached to the deposition, it was removed before it was sent from Denver.

Mr. Howard testifies that he did not remove the exhibit from the deposition and that it would have been impossible

to do so while he was examining the deposition, because the clerk was present all the time he was examining it. But we are satisfied from the record that such a letter was received by the plaintiff and that, when his deposition as a witness was taken, this letter was attached to the deposition and that the original deed and assignment were included therein. Witnesses in Denver, who had formerly lived in Jefferson, Iowa, and who were acquainted with the signatures of the grantors attached to the deed and with the signature of Mr. Howard, testify to seeing both the deed and the letter, and that the original letter was attached to the deposition. Without going into this matter too much in detail, the deposition of plaintiff Stickles was taken a second time at Denver and he testifies as to his acquaintance with the signature of Mr. Howard and that he had known him for twenty years; that he received the letter under discussion; that the signature to the letter was the genuine signature of A. D. Howard; that he had copies of the letter made by Miss Wells, and that Exhibit A, attached to the deposition of Spangler, is a correct copy of it; that he made comparison of the two; that he gave the original of said letter to Simonson, the notary public, when his first deposition was taken, and, the last time he saw it, it was attached to the deposition and marked Exhibit A.

Simonson, the notary, describes the letter and says he identified it by marking it Exhibit A and attached it to the deposition of Stickles and that it was forwarded by him to the clerk at Jefferson, Iowa.

Miss Wells testifies that, at the time the depositions were prepared, she made a copy of this letter for Mr. Spangler, one of plaintiff's attorneys; that the last she saw of the letter was when it was attached to the deposition of Mr. Stickles.

Spangler describes the letter, says he had it in his possession and had Miss Wells make a copy of it and that he compared the copy with the original; that he attached the copy to his deposition; says he last saw the original of the letter in the

hands of the notary and that it was attached to the first deposition of Stickles and marked Exhibit A.

Witness Ross testified that he lived at Denver, but formerly at Jefferson; had known A. D. Howard twenty-eight or thirty years and was familiar with his handwriting; saw the letter purporting to be from him to Stickles, dated July 25, 1906, on several occasions; that he was employed by plaintiff as attorney in this matter and as such attorney had the latter in his possession; that he corresponded with Howard in regard to the matter in controversy.

The clerk of court testified that when he received the package of depositions, the package was not broken.

Miss Stevenson, clerk in the office of the clerk of courts, testifies that when the package of depositions arrived she laid them on the clerk's table; that the clerk went home to do some work and that she took care of the deposition and sent notices to the attorneys; that she was in the office until five o'clock that afternoon, and between one o'clock and five, she looked through the first deposition and that she then saw the paper marked Exhibit A; that she was familiar with the signature of A. D. Howard and his signature was attached to the paper which she says was marked Exhibit A.

Plaintiff testifies that he was acquainted with the signatures of his two half brothers and his half sister, and that the signatures to the deed and assignment sent to him in Exhibit A were their genuine signatures and that the signature of the notary to the acknowledgment thereto was the genuine signature of Mr. Howard.

Plaintiff's wife testifies that she saw such instruments in her husband's possession in Denver; that a copy was made and she helped proofread the copy; that a certificate purporting to be signed by A. D. Howard and his notarial seal were affixed to such deed; and that the signatures to said documents were those of Ross, Elda, and Frank, the grantors; that she knows her husband mailed the deed and other document back to A. D. Howard.

Other witnesses testify on this matter and there are other circumstances in the case bearing upon this proposition; and, while there is a sharp conflict in the testimony as to whether

3. DEEDS: delivery: inability of grantor to recall.

Mr. Howard did write such a letter to plaintiff, described as Exhibit A, enclosing therein the original deed and assignment to plaintiff, we are satisfied that the weight of the evidence sustains plaintiff's contention that such a letter was sent and that the documents were enclosed therein; and, furthermore, the trial court, having seen the witnesses and their manner of testifying, so found, and we ought to, and do, give some weight to such finding. We think the weight of the evidence, when taken in connection with all the circumstances and the entire situation, shows that such delivery to plaintiff by Howard was authorized by defendants, and that it was the intention and purpose of the defendants that plaintiff should share equally with them in the property of the deceased, and, of course, if this be true, the failure of Howard to record the deed and his returning it to defendants without authority from plaintiff would not affect plaintiff's rights.

Some of the circumstances already mentioned bear upon this proposition and we shall briefly mention some of the others. All concede that before the deed was executed there was talk of making out papers so that plaintiff should share equally with the defendants, though they now say it was upon certain conditions; it is shown that there was affection between plaintiff and defendants; the deed itself expresses the purpose and intention that plaintiff should share equally, and, as before stated, is entirely silent as to the present claim of defendants that there was a parol understanding that this should be upon condition that plaintiff should straighten up. At least two of the heirs as witnesses testified that they did not order Mr. Howard not to deliver the deed to plaintiff; they attempt to qualify this upon further examination by their counsel and in response to leading questions, but their attempted explanation or qualification is not entirely satisfac-

tory. There is evidence that, after this controversy arose, the three defendants stated that they were willing that plaintiff should have his share, though defendants deny that they so stated. Plaintiff contends that as to this matter Mr. Howard was acting as his attorney, and that a delivery to him by the heirs, even though Mr. Howard was then acting as attorney for all the parties interested, was good. Mr. Howard was the administrator.

We have not set out the testimony bearing upon this point and do not deem it necessary to do so, in view of our conclusion on the other points.

We are of opinion that the decree of the district court was right and it is therefore—*Affirmed*.

DEEMER, C. J., WEAVER, and EVANS, JJ., concur.

HANNAH STROMBERG et al., Appellants, v. WILLIAM L. ALEXANDER, Appellee.

EXCHANGE OF PROPERTY: Rescission of Contract—Fraud.

- 1 Evidence reviewed, and *held*, plaintiffs had the right to rescind a contract for the exchange of properties, especially in view of defendant's conduct in corrupting plaintiffs' agent.

REFORMATION OF INSTRUMENTS: Sufficiency of Evidence—

- 2 **Fraud.** The court will be slow to decree specific performance on the application of one who is shown to have corrupted his adversary's agent in the very transaction as to which specific performance is sought.

Appeal from Webster District Court.—HON. ROBERT M. WRIGHT, Judge.

MONDAY, OCTOBER 4, 1915.

THIS action in equity was brought by plaintiffs to quiet title to land in Webster county, Iowa, after rescission by them of a contract with defendant for the exchange of said land for land in Texas. By cross-petition, defendant asked that the

contract be reformed and that he have specific performance. Plaintiffs' petition was dismissed by the trial court and the relief asked by defendant was granted. Plaintiffs appeal. —*Reversed and Remanded.*

Kenyon, Kelleher & O'Connor, for appellants.

Healy, Burnquist & Thomas, for appellee.

PRESTON, J.—1. Plaintiff, Hannah Stromberg, a widow, is the mother of the other two plaintiffs. The negotiations were carried on largely by the son, Ernst, a young man twenty-seven years of age, who went to Texas with defendant and one Marsh to look at the land. The daughter, Ebba, took but little part in the transaction, but left the matter largely to her brother and mother. The written contract was executed January 7, 1911. It was drawn by an attorney who is now one of plaintiffs' counsel. The substance of the contract, or so much thereof as is necessary to here state, is: Plaintiffs agreed to sell their 160 acres of land in Webster county, Iowa, at \$130 per acre, and to give a deed therefor containing the usual covenants of warranty, to be delivered subject to conditions named, on March 1, 1911, and to furnish an abstract showing a merchantable title at least thirty days before March 1, 1911; taxes for the year, 1911, to be paid by plaintiffs, first parties. The consideration therefor was to be paid by defendant as follows: \$1,000 upon the execution of the contract; \$5,000 March 1, 1911—the said \$5,000 to be applied on a \$25,000 mortgage against the land, the balance of which defendant assumed. The interest earned on said mortgage prior to March 1, 1911, was to be paid by first parties, and interest thereafter to be paid by second party. In payment of \$12,000 of the consideration which second party was to pay for said land, he was to convey to first parties 320 acres of land in Deaf Smith county, Texas, at \$37.50 per acre. The Texas land is described in the contract as north half of section 4 in block

1. EXCHANGE OF
PROPERTY: re-
scission of con-
tract: fraud.

K-8, in said county. Second party was to execute and deliver to first parties, on March 1, 1911, a warranty deed, and to procure and deliver to first parties an abstract of title showing a merchantable title to said premises in second party, not later than September 1, 1911.

“In case the abstract of title to be furnished by second party is not furnished by March 1, 1911, then the first parties shall not be obligated to deliver said deed to the Webster county land until said abstract to the Texas land is furnished, and in such event said deeds shall be left in escrow at the Fort Dodge National Bank of Fort Dodge, Iowa, to be exchanged and delivered to the respective parties upon the furnishing of the abstract of title aforesaid. In case there should be a delay beyond March 1, 1911, on the part of said second party, in furnishing an abstract to the Texas property, the said second party shall, notwithstanding such delay, make the payments at the time specified above, to wit, \$5,000 on March 1, 1911, and shall take and receive possession of the Webster county land on March 1, 1911, and the said second party shall deliver and the said first parties shall take and receive possession of the Texas land on the same date. In case the said second party shall fail to comply with the terms of this agreement in the furnishing of said abstract of title showing title aforesaid not later than September 1, 1911, and in case for said reason this contract should be rescinded by the said first parties because thereof, the said second party shall receive back from the first party the money hereon paid and the possession of said Texas land, with 5 per cent. interest from the date same is paid, unless the said second party is permitted to retain the rentals of the premises located in Webster county, Iowa, for the year 1911, in which event and in case he retains such rentals and collects the same, he shall receive no interest on said cash payments, but merely the principal shall be returned. The balance of the purchase price over and above the value of the Texas land, the \$20,000 mortgage assumed,

and the \$6,000 in cash payments, shall be paid by the said second party to first party by giving a promissory note, executed and dated on March 1, 1911, secured by a second mortgage on the land located in Webster county and herein agreed to be conveyed to said second party, which mortgage shall run second only to the mortgage now standing against said premises, which said note shall be due on or before March 1, 1912, and draw interest at the rate of 5 per cent., payable annually. Said mortgage shall be executed on March 1, 1911, and delivered on said date, in case the deeds to said premises are delivered to the said second party by the first party; but in case said deed is left with the Fort Dodge National Bank because of the matters above set forth, then said mortgage and note shall be left with said bank to be delivered at the same time such deeds shall be delivered. It is understood by the parties that the land located in Webster county is leased for the year 1911, and that the said second party is to receive said lease. All taxes payable during the year 1911 on the Texas land shall be paid by the said second party, the Webster county premises to be left in same condition they are now, all insurance to be turned over to second party thereon March 1, 1911."

The time for defendant to furnish an abstract to the Texas land and for performance of the contract was extended to March 1, 1912. This extension was at the request of defendant, in order that he might perfect his title and correct the abstract of title first tendered, or make a new one. Defendant took possession of the Iowa land under the contract on March 1, 1911, and paid \$6,000. Plaintiffs returned the \$6,000 to defendant, March 1, 1912, and on said date gave defendant written notice of rescission, on the ground that defendant had not complied with the terms of said contract and had not furnished the abstract of title to the Texas land showing title to be in defendant as required by the terms of said contract, and had not furnished plaintiffs, as provided by the terms of said

contract, an abstract showing a merchantable title to said premises as per the terms of the contract as extended, and within the time provided for in the contract as extended. By the same written notice, plaintiffs offered to return to defendant all property and money received by them under the contract and offered to place him in the same position as he occupied previous to the making of the contract; authorized him to receive from the Fort Dodge National Bank the deed to the Texas land deposited by defendant in escrow, and to receive from said bank the mortgage and note left by him in the bank in escrow, and to receive from said bank such papers executed by him pursuant to the contract and left in said bank, and notified defendant that the transaction was thereby rescinded in all of its respects. By the same writing, plaintiffs also demanded the return to them of the abstract of title to the Webster county land and all other papers received by defendant except the lease and rental, which, by the terms of the contract, defendant was authorized to retain in case plaintiffs rescinded the contract because of defendant's failure to furnish abstract. On the same day, defendant served two notices on plaintiffs, demanding performance of the contract and tendering an abstract of title to land in Texas, which he claimed was in compliance with the contract, and also tendered a deed to the north half of section 3, Block K-8, Deaf Smith county, Texas. The grantee named in this deed was Hannah Stromberg alone. On the trial of the case in June, 1913, it was discovered that the grantee in this deed was Hannah Stromberg alone, and defendant then offered to permit the names of the other two plaintiffs to be inserted in the deed or to execute a new deed. The original of this deed has been certified and clearly shows that the word "three" and the figure "3" in the description have been altered by erasures. There was some evidence upon this point, and plaintiffs claim that this description was changed from section 4 (as described in the written contract) to section 3.

Plaintiffs did not take possession of the Texas land and

have exercised no acts of ownership over it. By amendment to the petition filed August 29, 1912, and setting up supplemental matter, plaintiffs alleged that on March 1, 1912, they were entitled to the immediate possession of the Webster county land, and to the rentals for the year 1912, but that defendant is collecting the rental therefor and that the amount of such rental is about \$1,500, which defendant has appropriated, but that there is an implied obligation to return the same to plaintiffs, and that he holds the same for their benefit. They ask judgment against defendant for the amount of such rental and that the same be ascertained and that a writ of attachment issue. A writ of attachment was issued.

By answer and cross-petition, defendant avers that through accident, oversight and mistake of all parties to the contract, and of the scrivener who drew it, the land then owned by defendant in Texas was described as being located in section 4, when in truth and in fact said land should have been described as being located in section 3, and that it was contemplated by the parties that the land in section 3 should be conveyed to plaintiffs; that on March 1, 1912, he was ready, willing and able to perform fully his part of the contract whereby he undertook to convey said north half of section 3; and that on said date, he tendered, in Webster county, Iowa, to plaintiffs, full performance; that plaintiffs repudiated the contract, refused to perform the same and endeavored to rescind; admits that plaintiffs sent a \$6,000 draft to him which he refused to accept and tendered the return thereof to plaintiffs, and states that he brings the same into court for that purpose; tendered full performance of all the conditions of the contract as actually made between the parties; asked that the contract be reformed and specifically enforced. June 3, 1913, and after the case had been called for trial, defendant by an amendment consented that, in the event the court should enter decree for defendant, interest at the lawful rate might be assessed by the court on the \$6,000 draft returned to the defendant by plaintiffs, from March 1, 1912.

Plaintiffs allege in reply that the description of the Texas land as made in the contract was made with the full understanding and knowledge of defendant; that defendant directed and instructed that said description be placed in the contract as the same was in fact placed therein; and that the land which defendant informed the scrivener was to be conveyed was in section 4, and that the parties at no time intended any other land than that described in the contract to be covered thereby or conveyed; deny that there was any oversight or mistake and deny that either of the parties to the contract or the scrivener understood said contract to convey any property, other than that in fact described therein; deny that defendant refused to accept the \$6,000 draft, but allege that defendant has retained and kept the same; they allege that defendant is unable to perform his said contract, and allege that he has never, at any time, been in a position to perform the same. In a separate division in the reply, plaintiffs plead that defendant is estopped from asserting that any land other than that described in the contract was intended to be conveyed, and estopped from asserting any error made by either the scrivener or the parties, and estopped from claiming or asserting that the land intended to be sold was in section 3, and estopped from asserting any rights under the contract or asking the enforcement thereof, and estopped from asserting that the same has not been rescinded, for the following reasons: That previous to the execution of the contract, defendant invited plaintiff Ernst Stromberg, on behalf of the plaintiffs, to inspect the land proposed to be traded to plaintiffs, and informed plaintiffs at said time that said land was located in section 4; that said Ernst accompanied defendant, and said land was described to said Ernst as being in section 4 at the time, and while said Ernst was on the ground; that thereafter, in the presence of all the plaintiffs, defendant stated to the scrivener drawing said contract that said land was located in section 4; that, subsequent to the execution of the contract, defendant never informed plaintiffs that he claimed said con-

tract was erroneously drawn, or that the land was of a different description from that so stated by him and described in the contract; that on March 1, 1912, defendant served upon these plaintiffs a notice which includes the following statements:

“You and each of you are hereby notified that the undersigned, William L. Alexander, herewith tenders to you an abstract of title to the real estate situated in the state of Texas that is described in the contract bearing date, January 7th, 1911, and this tender is served upon you as part of the tender of performance, and as part of the notice heretofore served upon you this day.”

That the abstract so tendered these plaintiffs with said written notice covered lands located in section 4 as well as lands located in section 3, and that defendant at the time of making said formal tender failed to inform plaintiffs that the land covered by the abstracts so tendered was intended to be land located in section 3 rather than section 4, but that defendant tendered the abstract in question as covering the land described in the contract; plaintiffs allege that the abstract so tendered relating to lands located in section 4 failed to show any title to said lands in the defendant, and failed to show the title to the land described in the contract to be in defendant, and that at no time did defendant ever claim to plaintiffs that the lands described in the contract were not clearly described until the filing of the answer January 8, 1913; that on March 1, 1912, and subsequent to the making of said tender by defendant, above quoted, plaintiffs went to the bank and borrowed \$6,000, giving their note therefor and obligating themselves to pay interest thereon, and sent a draft for \$6,000 to defendant with their written tender; that in doing so they relied upon the fact that the defendant, in making tender of the abstract in fact tendered by him, tendered said abstract as covering the title to land described in the contract, and relied upon the position thus taken by defendant,

and upon the fact that defendant did not claim that any land other than that described in the contract was intended to be conveyed to plaintiffs; that defendant has kept said \$6,000 draft in his possession and still retains the same; that, by reason of such facts, defendant is estopped, and that he has acquiesced in the rescission of the contract made by plaintiffs and has waived any objection thereto by retaining and depriving plaintiffs of the use of said \$6,000. Defendant claims that after the contract was dictated, he did not wait until it had been struck off in typewriting, but that it was sent to him in Illinois and that he signed it without reading, and that he did not know, until after March 1, 1912, that the contract described the Texas land as in section 4. Plaintiffs claim that the contract expresses the agreement as they understood it and that they thought they were trading for land in section 4, and they say that they did not know, until after March 1, 1912, that defendant claimed otherwise, or that he claimed that the land he was trading was in section 3.

During the trial, plaintiffs amended their petition and alleged:

“That, without their knowledge or consent, the said defendant employed and agreed to pay the agent of these plaintiffs, one Fred Marsh, for his services in inducing these plaintiffs to close this contract or to execute papers and agree to the exchange planned; that said Fred Marsh at said time was the agent of these plaintiffs and such fact was known to said defendant; and that, by virtue of such employment by the said defendant of the said Marsh in inducing the said Marsh to aid the said defendant, these plaintiffs were induced by representations made by the said Marsh and said defendant, as to value, etc., to enter into said contract, and that the said defendant herein procured said contract to be executed by these plaintiffs through fraud and deceit, thus practiced, and that under all the circumstances it would be uncon-

seionable to enforce such contract as against these plaintiffs, and the same should be cancelled."

As before stated, plaintiffs agreed to pay \$37.50 per acre for the 320 acres of Texas land. A witness for plaintiffs, whom we hold qualified to give his opinion, testified that the value of the Texas land was not to exceed \$5.00 per acre, and this is not disputed by any other witness in the case. Defendant himself testified that, before he and Marsh and Ernst Stromberg went to Texas, and before the contract was completed, he knew that Marsh was plaintiffs' agent in the sale of their land, and supposed that plaintiffs were to pay Marsh a commission, and that, while these three parties were in Texas, defendant agreed to pay Marsh \$100, if the contract was completed and the papers delivered; that this was done for the purpose of having said Marsh influence the plaintiffs in that respect. Marsh testifies that his commissions from plaintiffs would have been \$300, but that after the trip to Texas, he accepted a note from plaintiffs for \$200, and that he expected to get the other \$100 from defendant. He did not inform plaintiffs of that fact. Plaintiffs testify that Marsh did urge them to make the trade and that they were influenced thereby to enter into the contract. There is some discrepancy in the testimony of some of the plaintiffs as to what the real agreement was, between them and Marsh, as to the payment of a commission; but taking the evidence all together, including that of defendant, we are satisfied that Marsh was the agent of plaintiffs and was to receive a commission from plaintiffs and that defendant knew that fact and that his offer to pay plaintiffs' said agent, Marsh, for the purpose indicated was improper, and we regard it as a strong circumstance against defendant's right to specific performance. Plaintiffs contend that, even though the Texas land for which plaintiffs were to pay \$37.50 per acre was worth but \$5.00, this would not, of itself, be a sufficient ground for refusing specific performance; yet this, with the

fraud of defendant in corrupting plaintiffs' agent, would, together and by themselves alone, be sufficient to prevent specific performance, and would be ground for rescission in equity.

It appears that plaintiffs did not know of this alleged fraud until after they served their notice of rescission, March 1, 1912, and they ask in their amendment to the petition filed during the trial that the contract be cancelled because of the fraud. Defendant retained the \$6,000 draft a year or more. His explanation of this is that he directed his attorney in Illinois to return it, but through the neglect of the attorney, it was not done.

2. At the time the contract was executed, defendant was interested in land in both sections 3 and 4 in Deaf Smith county, Texas, but there is no claim that he complied with the contract as written or that he tendered an abstract and performance as to land in section 4 described in the contract. The defendant has the burden on the issue as to the alleged mistake, and unless he has shown, by evidence which is clear, satisfactory and convincing, that there was a mistake in the description of the Texas land and that it was mutual, or that the contract drawn professedly to carry out the agreement of the parties previously entered into was executed under the misapprehension that it really embodied the agreement, but by mistake of the draftsman it failed to fulfill that purpose, reformation will be refused.

"To entitle the party to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he seeks to have established, and that this intention was frustrated either from some fraud, accident, or mutual mistake of the parties." *Day v. Dyer*, 171 Iowa 437, and cases.

If defendant is not entitled to a reformation of the contract, then, of course, he is not entitled to a specific performance, and in that case, plaintiffs had a right to rescind and would be entitled to the relief they ask.

It is conceded in argument that the real issue is upon the cross-bill—that is, as to the reformation and specific performance. After a careful consideration of the record, all of which has been read, we are of opinion that defendant has not shown himself to be entitled to a reformation of the contract. This conclusion decides the case, and we shall refer to the evidence bearing upon this point more in detail, and briefly refer to other points; but it would serve no useful purpose to attempt to set out all the evidence. There are some circumstances in the evidence of defendant tending to show that the parties were trading for land in section 3; but we think the weight of the evidence is in favor of the contention of plaintiffs, that they understood they were trading for land in section 4, and that the contract expresses the intention as they understood it.

It should be said that the three plaintiffs were called by the defendant as his witnesses, and part of the testimony relied upon by defendant to show the alleged mistake was the evidence of the plaintiffs, or some of them; and, as stated, their claim is that they understood that they were trading for land in section 4. By calling the adverse parties, defendant is perhaps not bound by their testimony, and yet it is his evidence. We shall now refer to some of the circumstances which show that plaintiffs were not trading for land in section 3, and that their understanding was that they were to receive land in section 4, and that the agreement was that they were trading for land in the last named section. None of the plaintiffs, except Ernst, went to Texas. None of them knew anything of the description of the land except as they were informed by defendant. Ernst did examine land shown by defendant, but says that by looking at the land he could not tell the section in which it was located, and defendant testifies to substantially the same. At least four witnesses, the three plaintiffs and Marsh, testified that before Ernst went to Texas, defendant told them that Ernst was to look at the land in section 4 and plaintiffs were to trade for land

in that section (this is denied by the defendant); the contract itself describes the land as in section 4; on March 1, 1912, defendant served notice on plaintiffs demanding performance of the contract; the abstracts first tendered showed land in both 3 and 4; defendant was interested in land in both sections 3 and 4; the deed tendered by defendant shows an erasure of some other description than section 3 and a change to section 3. Both Ernst and defendant describe the distance and route taken by them in driving from the town of Hereford to the land shown, the character of the land, which, from the evidence, appears to be similar in both sections, the improvements, ploughed ground, etc. Witness Wrench testifies as to improvements on section 3. From such descriptions, it is claimed by plaintiffs that the land shown was in section 4, while it is claimed for defendant that it was in section 3. But from this description alone, it would be difficult for us to say whether the land was in 3 or 4. At the time the contract was dictated, there were present, Ernst Stromberg, Marsh, O'Connor, Mrs. Kelleher, the stenographer, and defendant. Defendant claims that, while Mr. O'Connor was dictating the terms of the contract, he (defendant) handed O'Connor an old deed, from which O'Connor should have described land in section 3. This is denied by all others present. While they all admit that defendant had a paper in his hand at this time, they deny that it was handed to O'Connor, and they all testify to circumstances showing that there was no mistake, but that defendant by word of mouth gave the description to O'Connor as in section 4, and that O'Connor so dictated it, and the stenographer testifies that she took it down correctly and correctly struck it off in typewriting; that defendant was present when O'Connor was dictating the contract and dictated section 4. Defendant testifies and claims that he understood it was section 3 and that the contract should have so described it. Defendant at first testified that he told plaintiffs he owned a section of land in Texas, but on cross-examination states that he made a mis-

take in that, and says that he told them that he owned a one-third interest in a section and a half of land in Texas. In connection with his testimony, an agreement was produced, between defendant and the other owners of the section and a half of land in sections 3 and 4, by which the others were to deed to defendant or release to him all their interest in the north half of section 3, and defendant was to release his interest in section 4; but the deed to defendant under this agreement was not delivered to him until after March 18, 1911, which was after the contract in question was drawn and executed. On cross-examination of defendant, he testified: "Q. So you don't remember, very well, the things that took place in Mr. O'Connor's office? A. I can't remember dates very well, or descriptions very well." He also testifies that at that time he had been up the night before and was tired and sleepy; says he was not asleep but didn't pay much attention to the drawing of the contract; that he left the office before the contract was struck off in typewriting and that he did not hear it read, and, as before stated, that when it was sent to him in Illinois, he signed it without reading it. The plaintiff Ernst Stromberg testifies that, before March 1, 1912, and when defendant was out, about September 1, 1911, to get an extension of the contract, defendant then had the contract, or a copy of it, and that witness saw defendant looking at it as though he was reading it. There are perhaps other circumstances bearing upon this question, but we shall not take the space to go into further detail. The defendant may have intended to describe and convey the land in section 3; but, as stated, he has not shown by that quantity and quality of proof required in such cases that there was a mutual mistake on the part of plaintiffs as well, or that the minds of the parties met and agreed on the proposition that defendant was to convey and plaintiffs receive land in section 3 instead of section 4.

3. It is further contended by plaintiffs that, even if it be true that the land in fact shown young Stromberg was in

section 3, and that defendant intended to describe in the contract such land, yet the evidence shows that such a mistake, if it was one, was the mistake of defendant and one arising from his own fault and neglect in failing to give the correct description of the land to be conveyed, and in failing to subsequently discover the mistake after it was made, and that defendant is estopped; that, relying upon the contract and defendant's demand for performance of the same as written, they borrowed money and obligated themselves to pay interest in order that they might tender back, on March 1, 1912, the \$6,000 which he had paid to them. We think there is force in this point, but deem it unnecessary to discuss it further, in view of our conclusion of the question of the reformation of the contract.

And we think there is force in plaintiffs' point referred to earlier in the opinion in regard to the value of the Texas land and the conduct of defendant with regard to plaintiffs'

agent. It is contended by defendant that
2. REFORMATION OF INSTRUMENTS: sufficiency of evidence: fraud. Marsh was a mere middleman and was not vested with any discretion or judgment in the negotiations and that he had a right to receive

compensation from both sides. We do not decide whether, under the circumstances in this case, Marsh was a mere middleman. But he did not inform plaintiffs and they had no knowledge, before the execution of the contract, that he was to receive compensation from defendant. Marsh went to Texas to see the land at the request of the plaintiffs: he was an experienced real estate man. Plaintiff Ernst was a young man without experience in values of Texas land; it was the duty of Marsh to give his principals his best information and judgment as to the value of the Texas land; and it may be that defendant feared he might do this. At any rate, defendant impliedly put Marsh in the position of perpetrating a fraud upon his principal, and defendant was a party to it. Without going further into the details of the evidence on this point and without further discussion, we should be slow to decree

specific performance under such circumstances. As bearing upon this, see *Hunter Realty Co. v. Spencer*, 95 Pac. 757 (17 L. R. A. (N. S.) 626, 627). It is true, the rule is that there is a certain discretion in the chancellor in granting or refusing specific performance, but the case is triable here *de novo* and that discretion is for us, as well as the trial court.

It is contended by appellants that the abstract of title tendered by defendant did not show a merchantable title to the land he claims he was selling to plaintiffs—that is, land in section 3; but we feel that we ought not to prolong the opinion in order to discuss this question, except to say that an unsatisfied mortgage is referred to in the abstract. A lawyer from Texas testified that, in his opinion, the abstract showed merchantable title; but he based his opinion upon an examination of the records as well as upon the abstract, and explained the reference to the mortgage by referring to records which were not shown upon the abstract. We may say that, taking all the facts and circumstances shown in this record, we are impressed that the equities of the case are with plaintiffs, and that the relief prayed by them should be granted. The arguments have taken a wide range, and the case has been fully and ably presented by counsel on both sides, but the principal question in the case is one of fact.

4. We are of opinion that the decree ought to be reversed. It is reversed and remanded, for a decree in harmony with this opinion; and in view of the fact that defendant has had possession of the Webster county, Iowa, land since March 1, 1911, and has been collecting rent thereon since March 1, 1912, and that the plaintiffs ask that the amount thereof be ascertained, and because of the payment of taxes by defendant on both the Texas and Iowa land, and perhaps some other similar matters, the case is remanded for further hearing as to such matters.—*Reversed and Remanded.*

DEEMER, C. J., WEAVER and EVANS, JJ., concur.

MARY CARRIGAN, Administratrix, Appellee, v. MINNEAPOLIS &
ST. LOUIS RAILROAD COMPANY, Appellant.

RAILROADS: Personal Injury—Negligence—Belated Train. No
1 presumption of negligence arises from the naked fact that a train was behind its scheduled time.

RAILROADS: Personal Injury—Negligence—Lookout—Rule of
2 **Duty.** It is pure speculation to charge the jury that a carrier, in approaching a crossing, must keep a lookout for horses which "*might take fright.*"

RAILROADS: Personal Injury—Negligence—Dragnet Instruction.
3 The door of pure speculation is opened to a jury by an instruction which permits the jury to predicate negligence on the failure to perform "acts or things" (a) not complained of in the pleadings, (b) not shown in the evidence, and (c) not specified in the instruction.

NEGLIGENCE: "Last Clear Chance"—Evidence Reviewed. Evi-
4 dence reviewed and held to show no negligence rendering defendant liable under the doctrine of the "last clear chance."

NEGLIGENCE: Statutory Duty—Violation—Proximate Cause.
5 The violation of a statutory duty does not necessarily fix responsibility for an injury. The breach of duty must be the proximate cause of the damage to plaintiff. The connection of cause and effect must appear.

PRINCIPLE APPLIED: A train, going northwest at from 7 to 12 miles per hour, and making much noise, approached the crossing on a highway running north and south, on which highway deceased had been traveling northward for a distance of some 1,500 feet with a horse and buggy, and at a rate of about 8 miles per hour. Some objects on the east side of the highway would at times hide the view of the train, but the train was easily observable for practically the entire 1,500 feet. About 200 feet south of the crossing, deceased stopped. Momentarily thereafter, the horse took fright, lunged toward the crossing, there met the engine, veered away, threw deceased out and she was killed. Assuming failure to give the statutory whistle and bell signals, *held* that the presumption that deceased exercised due care carried with it the presumption that she saw the train

in ample time and therefore the failure to give the signals was not the proximate cause of the death of deceased.

Appeal from Palo Alto District Court.—HON. N. J. LEE, Judge.

FRIDAY, APRIL 9, 1915.

REHEARING DENIED TUESDAY, OCTOBER 5, 1915.

ACTION for damages for alleged negligence resulting in the death of Teresa Carrigan. The action is brought by the mother of the decedent as administratrix. There was a verdict for the plaintiff. The defendant appeals.—*Reversed.*

Davidson & Burt and *E. A. Morling*, for appellee.

Price & Joyce, for appellant.

EVANS, J.—The accident involved herein occurred on the highway crossing shortly before 5:00 P. M. on November 29, 1912. The decedent was a young lady 19 years of age, engaged in school teaching five miles distant from her home. She was driving a horse and buggy towards her home at the time of the accident. One of the immediate circumstances of the accident was that her horse became frightened shortly before she reached the crossing, and ran away. It left the highway and jumped over the cattle guards on the railroad right of way, throwing the plaintiff out of the buggy. The train was brought to a quick stop. The body of the decedent was found lying across the rail between the two drivers. Her leg and arm and back were broken. The external evidence of mutilation was comparatively slight, there being no apparent indication that any of the wheels of the engine had passed over any part of her body.

The crossing in question lies 1,500 feet north of the town of Ayrshire. The decedent was traveling north, her home being situated one-half mile north of the crossing. The train was a freight train, consisting of 26 cars and a caboose, and traveling northwesterly. The course of the railway from Ayr-

shire north to the crossing in question is the hypotenuse of a right-angled triangle, the highway upon which the decedent was traveling being the perpendicular, and Allowa avenue, lying along the north line of Ayrshire, being the base thereof. At the avenue, the distance between the highway and the railway would be about 600 feet. Toward the upper end of the triangle there is a slight curve, so that the railway crosses the highway diagonally, a little west of northwest. The principal specification of negligence in the petition was the failure of the trainmen to give warning of the approach of the train. Between the town and the crossing there was a slight up grade. The train was a long one. It proceeded at an average speed of from 7 to 12 miles per hour and was going from 12 to 15 miles per hour as it approached the crossing. The distance from the depot to the crossing along the railway was 2,190 feet. The distance from the point where the engine started would be somewhat less. The whistling post was 950 feet south of the crossing. Witnesses for the plaintiff who saw and heard the train and heard the starting whistles testified that they heard no whistling thereafter at the whistling post nor any ringing of the bell. For the defendant, there was testimony to the contrary as to both warnings, so that a conflict is presented at this point. On the east side of the highway there were a number of residences and appurtenant buildings which, to that extent, would obstruct the view of the train. There was also a slight cut on the right of way near the upper end of the triangle. The train, however, was readily observable at frequent intervals for the entire course of the 1,500 feet. The road approached the crossing from the south, going down grade. From three to four hundred feet south of the crossing were buildings upon the east side of the highway and a slight rise of ground. These obstructed the view of the railway from the highway for a space of 100 feet or more. The decedent was observed by one of plaintiff's witnesses when she drove past these buildings. This witness, French, was one of the occupants of the place. At the same time, he saw and heard the train somewhat south of east of him. The train was

about 100 feet distant from the witness and somewhat further from the decedent. The witness was at that time on slightly higher ground than the decedent. The decedent was next seen by the trainmen, having brought her horse to a "standstill" about 200 feet south of the crossing. The horse was then observed to take fright, and within a few seconds thereafter, the sickening tragedy was done.

The controlling questions presented for our consideration may be stated briefly as follows:

(1) Was there any evidence of any other original negligence than the failure to give statutory signals?

(2) Was there any evidence of negligence on the "last clear chance" theory; that is to say, negligent failure to save the decedent after discovering her peril?

(3) Would the evidence warrant a finding that the failure to warn, if any, sustained any causal relation to the accident?

I. Instruction 15 will indicate concisely the specifications of negligence and the theory upon which the case was submitted in that regard, and was as follows:

"The next question you are required to consider is whether the defendant was guilty of negligence, and you are told that you are not permitted to consider any grounds of negligence other than those of which plaintiff complains. Plaintiff alleges that defendant was guilty of negligence in the following particulars:

"1. In running its said freight train at an unusual time along its track from its depot at Ayrshire, Iowa, toward the highway crossing in question, without giving such signals and alarms as would warn travelers upon said highway, especially those traveling with horses, to prevent them from approaching within an unsafe proximity to said track.

"2. In failing to sound the whistle of said engine sixty rods before reaching said highway and in failing to continuously ring the bell on the engine of said train in approaching said highway.

“3. In failing to keep a lookout on said train for travelers in the proximity of said crossing, especially those having horses that might take fright, in light of the situation and conditions surrounding said crossing and under which defendant’s trains were operated.

“4. In failing to slow down or stop said train and to avoid the injury to said Teresa Carrigan after having had time and opportunity so to do after discovering her perilous situation.

“If you find that the plaintiff has failed to show by a preponderance of evidence that defendant was guilty of negligence in some of the particulars of which she complains, she cannot recover in this action and your verdict should be for the defendant.”

As already indicated, the time of this accident was shortly before 5:00 P. M. There is no evidence in the record that there was anything unusual about this time. It was

not its scheduled time, but it was usually behind its scheduled time. We know of no rule that would permit such fact to be an element of affirmative negligence as against the defendant, though it might be a proper circumstance to be considered for the plaintiff on the question of contributory negligence.

1. RAILROADS :
personal in-
jury : negli-
gence : belated
train.

It will be noted, also, that some emphasis is laid upon the duty of the trainmen to keep a lookout for travelers in the proximity of the crossing, “especially those having horses

that might take fright.” The duty of lookout is undoubted, but the suggestion that some special duty rests upon the trainmen to discover the horses which “might take fright”

was to open the door of mere speculation and went quite beyond the rule of duty. When horses are frightened in the proximity of the crossing, duty is cast upon the trainmen with reference to such fact. If they approach the crossing

2. RAILROADS :
personal in-
jury : negli-
gence : look-
out : rule of
duty.

with the observance of due care, the fact that some horse *might* become frightened will not convert such care into negligence. But when fright is apparent and danger threatens, they must then use due care to avoid the threatened danger. The only evidence in this case bearing upon that feature of negligence is such as bears upon the question of "last clear chance," and will be considered in another paragraph. There is no evidence or claim in this case that the fright of the decedent's horse was caused by any wrongful conduct in the operation of the train, except the failure to give timely warning whereby the decedent would have been induced to stop at a longer and safer distance from the crossing. It may be noted, also, that the evidence for the plaintiff shows that the horse in question was docile and the decedent had no reason to apprehend undue fear on its part. There was, therefore, nothing out of the ordinary in this feature of the case and nothing upon which original negligence could be predicated.

3. RAILROADS :
personal in-
jury : negli-
gence : drag-
net instruc-
tion.

One other door of speculation was opened in the instructions as indicated in instruction 20, which contained the following:

" . . . And if you find that the circumstances and conditions surrounding said crossing and its approach by travelers required the defendant, in the exercise of ordinary care, to give warnings and do *things and acts* in addition to the sounding of the whistle and the ringing of the bell in the manner stated to warn travelers upon said highway to prevent them from approaching within an unsafe proximity to said track when running its trains toward said crossing, and you find that defendant failed to, give such additional warnings or do such other *acts and things* as you find were required of it in the exercise of ordinary care in the operation of said train toward said highway crossing, then defendant was guilty of negligence in that respect."

What other "things and acts" should the trainmen have done in order to perform their duty of due care in their approach to such crossing? The pleadings specify none; the evidence discloses none. Appellee relies at this point on *Kinyon v. Railway Co.*, 118 Iowa 349. That was a case where the plaintiff was overtaken with a herd of cattle upon a crossing by a swift train. He pleaded that the view of the track was obstructed by standing cars, by high embankments and tall weeds, and that the speed of the train was so great that a signal at the whistling post left too short a time for him to get off the crossing with the cattle, and that, in view of the great speed of the train and the obstruction of the view of the track, an earlier signal should have been given. It was held that these facts, if proven, would constitute negligence, and that the duty thereby cast upon the railway company was not inconsistent with the provisions of the statute which required the signal to be given "at least 60 rods" distant. There is nothing in the *Kinyon Case* which would permit a jury to consider as negligence "things and acts" not pleaded as such in the petition and not submitted as such in the instructions. We find no evidence in the record of any fact which could be specified as a basis for this part of the instructions. There is no escape from the conclusion that the record discloses no evidence of any original neglect on the part of the trainmen except the original failure to give the statutory signals.

II. Does the record disclose any evidence of neglect on the part of the trainmen in their approach to the crossing after the fright of the horse was apparent whereby danger of collision was threatened? The engineer McGowan occupied the right-hand side of the cab. The head brakeman Brown occupied the left side, and, as he claims, was keeping a lookout and ringing the bell. The following is his testimony as to what transpired:

4. NEGLIGENCE:
"last clear
chance": evi-
dence re-
viewed.

“ . . . I was looking north toward the head end of the engine through the front window. The side windows were open, as was the front window. I continued ringing the bell until the time I saw the girl. I continued in that position of looking ahead until I happened to glance to my side *and see the girl standing there*. I know the location of the silo, the barn, the house and the sheds in the triangle there. There are not many trees. When you get north of the barn the ground gradually slopes down. I couldn't tell exactly how much of the highway I could see while traveling along that cut. The closer we came to the crossing the more of the highway I could see. As we approached that crossing, the train was traveling between twelve and fifteen miles. When we left the town I got a highball from the hind end, and giving the sign we started to proceed. We whistled for the crossing, and I started to ring the bell, and I happened to glance over on my left and I see the girl standing there—*a horse and buggy standing there with a girl in it, and almost immediately after I see her there, the horse started to get frisky and I says 'easy on her Mac,' and at once the horse made a lunge*. I says 'that will do' and he throwed her into emergency. I stopped ringing the bell just as soon as I saw the horse standing there starting to get frisky. Just as soon as I said 'easy,' McGowan shut off the steam, which stops the exhaust noise of the engine. Mac threw it into emergency when I said 'easy on her.' The horse was coming down the road towards the train. He continued down the road until we were on the crossing. He couldn't have got across ahead of us on the crossing. He took the fence—went down the fence to the post—and struck the cattle guard, and turned directly north on the track. At the time the horse left the traveled portion of the road, he was on a gallop. The girl was holding the lines stiff. It looked to me like he had the bit in his teeth. When the buggy struck the wing gate of the cattle guard it tipped her right out in the middle of the track. The horse broke loose and was gone up the

track. It looked to me like the left-hand side of the buggy pushed the wing of this cattle guard down, and it ran up on it and tipped her out. The last I seen her, she was just going out of the buggy. She had not hit the ground when I saw her. The air pump in front of the fireman's seat box on the side of the boiler obstructed my vision. When I last saw her she was in front of the pilot of the engine. From the time I said 'that will do' from the time I have just described, the speed of the train was changed. It was almost still. The pilot just surged onto the buggy, and it kind of crushed it, and it all came onto the left side. When the buggy was turning over, it turned very rapidly. The buggy struck the cattle guard and dumped over before the engine hit it. After the engine stopped I followed the fireman out on the gangway and got down on the ground, and went around to the front end looking for her. When I got around I seen the engineer just going up on the gangway, and the girl lying across the track between the middle drivers. McGowan slacked the train back about three inches. I pulled her out. She was lying with the rail right across her, her hands out and her feet on the inside. She had on a pair of gloves and a pair of mittens over them. She had on an overcoat and a red stocking cap. She had lost the cap before she got to the track. . . ."

CROSS-EXAMINATION.

"I placed the locomotive where it appears in that picture. We pulled up there and stopped, and I went over in the road where I know she stood. Mr. Beardslee had the buggy, and I came up on the engine and stopped the engine, and told them right where the buggy was the time I first seen her. I located the point where the engine was from the barn. In locating the engine when you made the photograph, it was about eighty feet south of the south cattle guard. We were going from 12 to 15 miles an hour when the engine stood as I have located it in this picture. I took

the engineer's word for the speed. It would be my judgment that it was 12 or 15 miles an hour. The next I noticed the horse began to rear, and after it reared it plunged and came down the road about half way from the point where it was standing to the track. When the horse commenced to rear I said 'easy' and he stopped the exhaust. I gave the other signal immediately after that. I saw the girl holding the horse when it was rearing. She held it a moment or so; then it got away. I don't know how far the horse had gone when I told him 'that will do.' . . . I looked at the barn with the idea of fixing its location. When I could see her across the corner of the barn, that is when I first saw her, there was nothing north of the barn between the track to interfere with my vision. My recollection is that she was a little better than clear of the barn when I saw her. At the time of the accident when I went up the road to the point where I first saw the girl, we must have backed eight or ten car lengths. What I did that day was simply to locate the buggy where I first saw it. The barn was all I had to locate it from. The other day when the photographs were taken, I located the buggy in the same way. After getting her location, I figured back as to where I was on the engine when I saw her. When I first saw her she was a little more than clear of the barn. Where the buggy track left the road I would say was about 100 feet from where I first seen her. I do not remember the individual whistling posts at which the engineer whistled on the day of the accident. I know exactly the locations of the girl and the engine when I first saw her. I have been up and down there most every day since it happened, and I have pictured in my mind where that buggy stood. Every time going north I have looked to see where I was located, and to see where the girl was located. When I said 'easy,' the horse was rearing, and immediately after it started I said 'that will do.' I can't locate how far the horse had gone when I said 'that will do.' It hadn't left the traveled track. I don't know where we were at that time,

but we were so close on the crossing the horse could not have gotten across. He had to go to the fence in order to get in ahead of us. Just as soon as I saw the horse rear, I said, 'easy,' and she was then about two hundred feet back. I made a mental note at the time I gave the signal. I thought it all over after the accident. The train crew and myself have talked it over a little. I didn't ask any questions. I just told it. They asked me a few questions."

Engineer McGowan testified as follows:

" . . . As we were proceeding up past the whistling post towards the crossing, the exhaust from the engine was quite loud. After I blew this whistle, we proceeded along about 50 rods or 60 before anything happened. I was just a short distance south of the cattle guard. I was looking straight ahead. I heard Brakeman Brown say 'easy.' Upon hearing this I shut off the throttle. I shut off the throttle, and immediately he said 'that will do,' and I threw the brake valve into emergency. The puffing ceases by shutting off the throttle, and stops the power of the engine. At this place south of the crossing when I shut off the engine I should judge I was traveling between ten and twelve miles an hour. 'That will do' means to stop. He said 'that will do' just as loud as he could. It conveyed to me that there was danger and I must stop. When you let loose of the throttle, your hand will drop on top of the brake handle. We had a Westinghouse brake on that train. It is a standard equipment. The brake lever can move from two or three inches in its quadrant. When he stated that will do, I put it into emergency. You shove it away in a Westinghouse. I shoved it over the full length of the quadrant. I then stood up and leaned out of my right cab window, so I could look around the pilot. I was looking ahead. When I got up and looked out I saw a horse jumping over the cattle guard and immediately the buggy coming up and turning over on the cattle guard. I saw someone in it, but I didn't recog-

nize whether it was a man or woman or a girl. The horse was going north over the cattle guard. It was not hitched to the buggy at the time I saw it. The pilot of the engine when I saw all of this was just about going up on top of the buggy. The person was falling right in the center of the track ahead of the engine. When I saw this I didn't do anything. I couldn't do anything. There was no other appliances or machinery or lever or throttle or anything else connected with the operation of stopping of the engine that could have been operated at that time. There had been a slackening in the speed from the time I had thrown the emergency throttle over until I looked out. The engine just seemed to stop, and it just seemed like the slack ran up and forced it. The engine seemed to stop and then surge up. The slack from the rear end causes this surge. It is on account of the brakes setting on the engine and head cars quicker than the rear cars. The slack from the rear end coming up against the ones that have already stopped bunts them ahead. When I looked down I saw the girl lying, screaming. I immediately jumped down off the seat, and climbed down and got hold of her. When I climbed out of the engine I stepped on the cattle guard, the board that runs up and down to the cattle guard and the fence post. She was lying with her face down, the main driver having her clothes caught. She was lying on her stomach. Her body was resting over the right rail going north. I tried to remove her but could not. I immediately went back to the cab and released the air and slacked the engine back just slightly and put the air on again. Brown and Thompson came around and I hollered to Brown to pull her out. The distance between the two drivers wouldn't be much over two feet on the rail. It was within that space that her body was lying. There would be one driver and a pony truck wheel ahead of her body. There was no evidence at any place where either of those wheels had passed over her body. . . ."

CROSS-EXAMINATION.

"I believe a train under the conditions stated could be stopped between 60, 80 or 90 feet. I don't know whether there is any later improvement on this Westinghouse brake or not. It is not over three or four years old. It is about as good as the average brake valve. Before I received the signal 'easy' nothing had occurred out of the ordinary that day. We had gone from Fort Dodge to Ayrshire pretty nearly fifty miles. I always whistle at all of the whistling posts, and I don't believe that I have ever passed a road crossing without whistling for it, not unless it was at night when I could not see it. I have been running freight trains for seven years pretty near all of that time. I don't know as I would want to say that the bell was rung for every crossing in my seven years' experience. I remember particularly giving the 'highball' at that time. I don't charge my memory with every time I blow the whistle, or with every time I hear the bell rung. There was a whistling post there and we always whistled for that post going out of Ayrshire. The reason I say I whistled on that day was because I remembered whistling on that day, and especially after the accident I do. I believe I called Thompson's attention to it if he didn't remember of my blowing whistle and he said he did. I don't remember whether they asked me the question. There was some talk about it. It was almost instantly from the time he said 'easy' that he said 'that will do.' There was practically no space between. He didn't tell me what the trouble was on either occasion. When he said 'easy' I said I shut off the steam or throttle. Then he said 'that will do,' and I put the brake in emergency as quick as I could. It was practically one motion, shutting off the steam and throwing in the emergency. The number of feet that the train would come to a dead stop after he said 'easy' would be somewhere around 60 to 80 feet. . . . It is my judgment we were going from 10 to 12 miles an hour. My

attention was not called particularly to the speed. I judge from my recollection of it at the time. I said that I stopped it just as soon as it could be stopped, somewhere along between 60, 80 and 90 feet. When the brakeman first spoke I put my hand on the throttle and shut it off. When he spoke again, I dropped my hand to the brake and shut that off. I was turning my head towards him. I was not looking out of the window. I looked out of the window afterwards. I was standing up, looking out of the right cab window when I saw the buggy going over."

Similar testimony was given by the fireman, except that his duties gave him less opportunity for observation. The testimony above quoted from the abstract is set forth by question and answer in an amended abstract, which does not impeach the foregoing in any material respect. No testimony was offered on behalf of plaintiff tending to show negligence at this point. The plaintiff does assail the consistency of the testimony of the engineer and brakeman. It was the claim of brakeman Brown that when the horse began to rear, the engine was about 80 feet south of the crossing; that he gave the signals "easy" and "that will do" in quick succession. The latter means a quick stop. The engineer claims that he brought the train to a stop in from 60 to 90 feet. He claims that his engine was at the west cattle guard when he stopped. Witnesses for the plaintiff testified that the engine was 50 feet beyond the cattle guard when it stopped. All the expert witnesses testified that it would take from 100 to 150 feet to bring such a train to a stop after throwing on the emergency brake when going at a speed of 12 miles per hour. Counsel presents certain computations, the net effect of which is to show that the estimates of distance could not have been literally correct because inconsistent with each other. It is shown, for instance, that upon certain experiments made by plaintiff's witnesses, a person standing on the highway 200 feet south of the crossing could see the "top 3

feet'' of a 10-foot pole at a point on the railroad track 272 feet south of the crossing. The argument is that the brakeman, therefore, must have seen the decedent when the engine was 272 feet distant. The situation was such that, as the observer would recede along the highway further from the crossing than 200 feet, the view of the railroad track would be accordingly shortened. The testimony as to distance was an estimate only. The true distance might have been somewhat greater or somewhat less without impeaching the candor of the witness or the substantial value of his testimony. If his testimony is to be believed, the horse was standing still when he first saw it and he saw the beginning of the fright. If, therefore, he had seen it earlier at such a distance from the track, there was nothing in such a situation to call for a change of conduct.

The discovery of the fright of the horse and the danger imminent therefrom undoubtedly cast upon the trainmen the duty to avoid the threatened injury to the plaintiff so far as it lay within their power. Due care in such a case would be such a high degree of care as to be commensurate with the threatened injury. It is shown without dispute that the train was brought to a very quick stop. Several passengers on the train were witnesses. Some of them had been thrown from their seats to the floor of the car. The commotion of the sudden stop attracted the attention of many people within a considerable distance and they hastened to the spot to learn the cause of it. The horse galloped down the highway. At 80 or 85 feet from the crossing, it veered to the left and "headed" for the right of way, jumped the cattle guards, and escaped up the right of way ahead of the train, having broken loose from the buggy when it overturned in front of the train. In considering this testimony, it must be borne in mind that the entire accident, from its beginning to its awful end, was a matter of a very few seconds.

On the question of negligence at this point, it is not very material whether we deem it as pertaining to the "last

clear chance'' doctrine or whether we deem it as independent and original negligence. If the trainmen failed at this point to exercise the degree of care incumbent upon them to avoid the threatened injury to the plaintiff, the defendant would be liable on either theory, because such negligence would become the proximate cause of the injury. The duty of the trainmen would be predicated, of course, in large measure upon the helplessness on the part of the decedent to save herself. Theoretically, she would be required to exercise care also. But under the circumstances shown here, her helplessness was complete after she lost control of the horse; so that contributory negligence was quite impossible.

As already indicated, the plaintiff offered no evidence on her own part of the negligence of the trainmen at this point; she relies wholly upon the testimony for the defense and what is claimed to be its improbabilities or its inconsistencies.

It seems clear to us that the testimony does not show any negligence of the trainmen at this point, but, on the contrary, negatives it completely.

III. Assuming that the evidence is sufficient to go to the jury on the question of whether the statutory signals were given, the question still remains whether such failure sustained any causal relation to the accident.

5. NEGLIGENCE:
statutory
duty: viola-
tion: proxi-
mate cause.

We have already indicated the proximity of the railway to the highway and the opportunity for seeing the train. Several witnesses testified for the plaintiff to the fact that they had not heard the statutory signals. In each instance, however, their attention had been attracted to the train by its loud noises and the unusual quantities of smoke and steam which it was emitting. This resulted from the fact that the train was a very heavy one, and was pulling up more or less of a grade. The witnesses on both sides testified to its speed at an average of from 7 to 12 miles per hour. Plaintiff's witness, French, was the last to see the decedent before she was

seen by the brakeman. He was at the house nearest to the crossing on the east side of the highway. This was about 300 or 400 feet from the crossing. He saw the decedent passing along the highway 50 feet to the west of him and saw the train upon the track 100 feet to the east of him, or a little south of east. He estimated the speed of the train at 7 or 8 miles per hour. About 200 feet or a little more further south on the west side of the street was the Anglum home. The mother of the decedent, plaintiff herein, was at this home when her daughter drove by. According to the mother, as a witness, the daughter was driving at that time at about 8 miles an hour. Her custom was to drive the 5 miles in 40 minutes. That was the gait of the horse. After passing the Anglum home and after passing French, there would be a short distance where the buildings occupied by French would cut off the view of the train from the decedent. The contention of the defendant at this point is that the decedent drove within sight of the train practically all the way from Ayrshire; that the train was in plain view and hearing all the time; that, inasmuch as she was approaching the crossing, ordinary care required her to observe the approach of the train in the same direction; and that a presumption of fact arises that she did exercise ordinary care and did, therefore see, the train and knew of its approach to the crossing. Concededly, when the decedent passed the Anglum home she could have seen the train from that point. Her mother testified as follows:

“I don’t doubt it at all, if she looked, or thought, or realized that the train was on the track, that she could have seen it and she never would have taken the chance to drive so close.”

When she passed French, she appears to have slackened the pace of her horse and was between a “trot and a walk.” It is urged for the appellee that there were many obstructions on the east side of the highway and that there were only

a few narrow places where a view could be had. The record contains a large number of photographs taken from points 150 or 200 feet apart along the highway when looking toward the east. These photographs leave little room for argument on the proposition that the train was easily observable from the highway. It is true that photographs have their own deceptions, especially as to distance and proportion and perspective. But they cannot avoid obstructions to a line of vision. The decedent was presumed in the first instance to have exercised ordinary care on her part in approaching the crossing, and the trial court so instructed. The verdict sustained such presumption. The fact that she had brought her horse to a stop at 200 feet from the crossing supported such presumption strongly. The question that arises, then, is: Could she have exercised ordinary care in her approach to the crossing and yet failed to observe the train that was approaching the same crossing, and that was in plain view and hearing? Or must it be said, upon the undisputed facts relating to her conduct, that she did see the train and did govern her conduct thereby? We see no way to harmonize a finding of due care on her part without also finding that she looked for a train and necessarily observed it. This is consistent with the stop which she made 200 feet away. It is urged that she would have stopped at a safer distance if she had had warning. There is nothing in the evidence to justify this assumption. The horse was supposed to be gentle. It was not afraid of automobiles. It had never made trouble before. If the decedent knew of the approach of the train by observing the same as she drove along the highway, then the failure to signal at the whistling post was not material to her. In such case, the failure to give the statutory signals could not sustain any causal relation to the accident. The "runaway" occurred notwithstanding her knowledge of the approach of the train. The recent case of *Hunt v. Delano*, 169 Iowa 138, is relied on at this point. The only question under consideration by us in that case was whether the de-

cedent was guilty of contributory negligence as a matter of law. The question of the actionable negligence of the defendant was not disputed before us in that case. We held therein that the decedent was not, as a matter of law, guilty of contributory negligence. If such were the question herein, we should have no trouble in reaching the same conclusion. We reach the conclusion that the presumption of due care which obtained in favor of the decedent carried with it the presumption that she saw what ordinary care would necessarily see. If she saw the train at a safe distance, the accident could not be deemed to have been caused by the failure of the statutory warning signals. Indeed the "runaway" stands forth as the real cause of the injury—too plainly for candid dispute. The evidence will not warrant affirmative finding that such "runaway" was caused by any negligent act of the trainmen or was induced by any contributory negligence of the decedent.

The judgment entered below must therefore be—*Reversed*.

DEEMER, C. J., PRESTON and SALINGER, JJ., concur.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellee, v.
THE BOARD OF SUPERVISORS, Appellant.

DRAINS: Railway Right of Way—Benefits—Evidence. Evidence
1 reviewed and held to show substantial benefits to a railway right of way by reason of the construction of a public drain.

DRAINS: Railway Right of Way—Assessment of Benefits—Elements
2 Considered. In the assessment of a railway right of way for the cost of a public drain, it was held proper to consider the following elements of benefit, viz., (a) The greater ease and lessened expense of maintaining the right of way, (b) the greater permanence and security of embankments, (c) the increased life of all wooden materials, (d) the opportunity to substitute drainage pipe in lieu of trestles, and (e) the increased value of the acreage of the right of way, without reference to the fact that it was used for railway purposes.

DRAINS: Assessments—Equality of Burden—Railway Right of Way.

- 3 Special assessments should be so levied that approximate equality of burden is attained. Therefore, in assessing the cost of a drainage improvement, it was improper to so assess a railway right of way as to entirely absorb the benefits, while adjoining farm lands were so assessed as to absorb only one half or less of the benefits. In such case, held proper for the lower court to scale down an assessment of \$1,500 on a railway right of way to \$800.

Appeal from Hamilton District Court.—HON. C. G. LEE,
Judge.

FRIDAY, JUNE 18, 1915.

REHEARING DENIED TUESDAY, OCTOBER 5, 1915.

D. C. Chase and J. M. Blake, for appellant.

J. L. Kamrar, J. C. Davis and George E. Hise, for appellee.

WEAVER, J.—Some two miles of the plaintiff's right of way are included within the limits of Drainage District No. 114, in Hamilton county. The total cost of the drainage system was about \$91,000, and in assessing the same upon the property of the district, the commissioners estimated the amount chargeable to the railway company at \$1,500. The estimate was approved by the board of supervisors and a levy made accordingly. The company appealed to the district court where, after hearing the evidence, it was ordered that the assessment be reduced to \$800, and from this ruling and judgment the defendant has appealed to this court.

It is argued for the appellee that the railway is in no manner benefited by the drainage and ought not to be subjected to any tax therefor; or, if it be chargeable with any part of the cost thereof, then the assessment of \$1,500 is excessive and out of proportion to the benefits.

I. The trial court evidently found against the plaintiff's proposition that it was not benefited in any material degree

by the improvement, but sustained its further contention that

1. DRAINS: rail- the assessment is excessive. It is true that
way right of the company put upon the stand different en-
way: benefits: gineers in its employment, some of whom seem
evidence.

to go to the extent of saying that the drainage of ponds and surface water from the right of way is of no benefit or advantage whatever to the railway company or its property, a statement so radical and so contrary to the teaching of human observation and experience in general that the court was justified in refusing to be guided thereby. It appears from the proof that the two miles of railway in question is laid through the usual succession of slight elevations with intervening ponds, sloughs and wet or marsh lands which are common in that part of central Iowa. The map or plat prepared by the company's engineers indicates that, prior to the drainage, about one third of the right of way within the district ran through water and wet, low or marshy ground, one of the stretches of 800 feet being marked as water from 1 to 2 feet deep. For the passage of water under its tracks, the company was maintaining five bridges, two of them being of iron pipe 24 and 36 inches in diameter, and two trestles of one span each, and one trestle of two spans. The main line of the drainage ditch, laid with a 24-inch tile, approaches the right of way from the south near the west end of the district and crosses the right of way through the large pond of which we have spoken, then swinging around a somewhat extended curve to the east and south, it continues east near the line of the right of way, which it crosses again to the south through low and marshy ground about 2,200 feet east of the first crossing. The tile is there enlarged to 30 inches and continues to the southeast. Five thousand feet east of the point where we have noted the last crossing of the right of way by the main ditch, it is crossed by a lateral laid with 18-inch tile through a pond, and again, 1,100 feet still farther east, it is crossed by another lateral laid with 14-inch tile through water. The two laterals are brought together about 1,100

feet south of the right of way, and thence run south toward the main ditch. This survey was made while the ditch was in course of construction and the tile was in operation, to some extent. The engineer says the tile drains seemed to be sufficient to take care of the water, and that upon a more recent visit to the place, he did not observe any water on the right of way. It also appears that, since the ditching was done, the company has taken out the three trestles mentioned and substituted permanent embankments with concrete pipe openings, two of 24-inch and one of 36-inch diameter.

Without going further at this point, it is enough to say that from plaintiff's own showing it must have received very substantial benefits from the drainage afforded by this improvement, and should contribute in fair proportion to its cost.

II. The question left for us to consider is whether the trial court erred in finding the assessment excessive and reducing the amount from \$1,500 to \$800.

2. DRAINS: rail-
way right of
way: assess-
ment of bene-
fits: elements
considered.

We have no precedent which enumerates all the elements which may be taken into consideration in considering the benefits to a railroad company or to its property from an improvement of this kind, nor have we any recognized or settled rule by which such benefits may be measured in money with mathematical exactness, nor even with the approximate approach to the measure of exactness which may be applied to farm property or town lots. In cases of the latter kind, the benefits, if any, may to some extent be indicated by showing an increase in market value resulting or reasonably to be anticipated from the improvement. But railroads have no market value in the ordinary sense of that term. They are rarely bought and sold as other property is dealt with on the market; or, if so sold, the things which go to influence their money value, their purchase and sale, are of such magnitude and such character that the existence or nonexistence of a drainage system in any given district would be an entirely

negligible circumstance, and this is no less true if the benefit to the railway from such system is so clear and undisputed that no one can be found to question it. But the fact that the rule applicable to the assessment of benefits upon real property of another character, or rather, property subject to other uses, is found inapplicable to the property of a railway company is no reason for holding the statute inoperative as to property devoted to railroad purposes. The law presumes that all the real property within the district is benefited by the drainage, and the business of the board is to fix its proportionate liability for the expense. In the court below and in this court, the board of supervisors adopted the theory that the benefits of the drainage to the railway are to be ascertained by reference to the greater ease and lessened expense of maintaining the way, the greater permanence and security of the fills and embankments, the increased life of ties, posts and other wooden material, the opportunity afforded the railroad company to substitute pipe for trestles and thereby give its track a safer foundation with decreased outlay for upkeep, and other things of that nature. There was evidence also tending in some degree to show the difference which the changed conditions would make in the expense of maintaining the road and right of way. That these conditions, so far as they are found to exist, do afford a foundation for a fair estimate of the benefits is a reasonable conclusion. That there are still other conditions which, in a proper case, may be considered in estimating such benefits is no doubt true; for example, the benefit to the right of way as a mere matter of acreage, without special reference to the present use being made of it. See *Chicago, R. I. & P. R. v. Centerville*, 172 Iowa —, decided at this term of court.* If the property of a railway company were being subjected to a complete and itemized valuation to ascertain a basis upon which to regulate its schedule of rates, it would naturally and properly insist that its right of way be estimated upon the present value of the

* Delayed on rehearing, and not yet officially reported.

lands so occupied; for it could not reproduce its road at the present time except on the basis of present land values, and if so, then it would seem that improvements which clearly tend to increase such value are a tangible benefit to the company and its property.

But, taking this case as made by the evidence, we think the judgment below may be affirmed. The commissioners who made the original estimate, and upon whose testimony the

3. DRAINS : as-
essments :
equality of
burden : rail-
way right of
way.

defendant largely relies, testify in substance that the figure named by them represents the total actual benefit accruing to the railway company. In other words, if the railway company should pay the assessment of \$1,500, it will have paid in tax the full amount of the benefits it has received. The evidence also tends to show that the increased value of the farm lands upon which has been laid the heaviest burden of the cost of drainage is two or more times greater than the amount of the tax on the same lands. In other words, assuming the evidence to be correct, the assessment upon the railroad absorbs all the benefits thereto, while the assessments upon the farm lands are only about one half or less than one half of their benefits. This is not what the law contemplates. It is not enough to estimate the amount of benefits derived by any particular piece of property, and from that basis alone determine that the figure so found represents the proper tax. Ordinarily, it is to be expected that the benefits to the property of the district will exceed the tax, otherwise there would be no strong inducement to make the improvement. The true theory of apportionment would require the ascertainment of the full amount of benefit to each and every piece of real property in the district, also the total cost of the improvement. If it be found that the total cost equals the aggregate of all the benefits, then, of course, each piece of property will be taxed the full amount of its benefits; but if the total cost be less than the total benefits, then the tax in each particular case will bear the same proportion to the individual

benefits as the total cost bears to the total benefits. We think the record in this case indicates that the benefits to the entire district were considerably in excess of the cost, and the full benefit found to accrue to the railroad company being ascertained to be \$1,500, it was proper for the trial court to scale down the assessment in proportion to that excess.

The judgment appealed from is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

JAMES A. COAD, Appellant, v. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellee.

COURTS: Federal and State Courts—Concurrent Jurisdiction—Interstate Freight Overcharges—Recovery. The right to recover interstate freight charges, in excess of the duly established and published schedules of rates, may be enforced in a state court. Resort to the Interstate Commerce Commission or to the Federal courts is not required. Such action is not one for the recovery of *damages*, within the meaning of Sec. 9 of the Commerce Act (24 Stat. 379), but is an action for *debt*, and in no wise trenches on the regulatory rate powers of the Commission.

Appeal from Woodbury District Court.—HON. DAVID MOULD, Judge.

TUESDAY, OCTOBER 5, 1915.

ACTION at law to recover an amount of overcharges which the plaintiff alleges was exacted by the defendant for transportation of freight. The trial court sustained a demurrer to the petition, and from that ruling and from the judgment entered against him for costs, the plaintiff appeals.—*Reversed*.

Alfred Pizey and D. H. Sullivan, for appellant.

James B. Sheehan and Sargent, Strong & Struble, for appellee.

WEAVER, J.—The petition shows that the shipments upon which the charges for freight were made were of an interstate character. It is further alleged that the proper and allowable rates of transportation for such shipments had been and were fixed and provided for in a schedule established and published by the defendant and its connecting carriers and that the rate so scheduled was forty-two cents per hundred pounds; but defendant, disregarding the same, exacted from plaintiff the payment of charges for such service in excess of the scheduled rates to the amount of \$81.07, for which a recovery is demanded. The objection raised by the demurrer to the petition is that it appears from the stated facts therein pleaded that the state court has no jurisdiction to entertain an action of this nature, and that, if plaintiff has any remedy in the premises, it is to be found alone in a proceeding before the Interstate Commerce Commission or in an action in the Federal Court.

COURTS: federal and state courts: concurrent jurisdiction: interstate freight overcharges: recovery.

The statute in question, commonly known as the Interstate Commerce Act of February 4, 1887, with later modifying amendments, provides, among other things, that the carrier must make and publish its schedule of rates, after which, unless these rates are changed in the manner provided by law, both carrier and shipper must adhere strictly thereto. By section 8 of the act, a violation of these provisions by the carrier renders it liable for damages thereby resulting to any person. Section 9 allows a person so injured to make complaint to the Interstate Commerce Commission, or, if the circumstances justify it, he may recover his damages by action in the district court of the United States. Under section 16, if the commission awards damages in favor of the complainant, he may sue therefor in any Federal or state court having jurisdiction of the parties. Section 22 is to the effect that nothing in the act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

It has been held, and plaintiff concedes, that, if the claim made against the carrier under this law be one which involves inquiry into the reasonableness of the scheduled rates of freight upon an interstate shipment, the shipper's remedy in the first instance is by appeal or application to the Interstate Commerce Commission; but where the right asserted, if it exist at all, is one concerning which the commission has no discretion, the complainant is not required to invoke the action of the commission, but may take his case directly to the courts. *Pennsylvania R. Co. v. International*, 230 U. S. 184.

In the cited case, the carrier was charged with granting rebates from its scheduled rates for the benefit of certain shippers. Objection was there raised that the matter was one for the Interstate Commerce Commission and that the court had no jurisdiction. The Supreme Court of the United States overruled the point, saying: "In view of the obligation of the company to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference between free and contract coal.

. . . The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class." For the same reason, plaintiff in this case was not required to apply to the commission to have the act of the defendant in exacting more than its scheduled rates declared unreasonable or wrongful. The fact of such overcharge being conceded or proved, its illegality is established as a matter of law, and the shipper's right to recover is not open to question. The commission has no power or authority to legalize or approve the exaction. Under such circumstances, the court having jurisdiction of the parties will not refuse to hear him simply because he did not first lay his complaint before the commission.

The sole question then is whether the right to a recovery upon such claim may be enforced in a state court. The case last cited was instituted and disposed of in the Federal courts and affords us no aid at this point. Of the general question of concurrent jurisdiction of civil cases in the state and Federal courts for the enforcement of rights and liabilities under the laws of the United States, it seems to be the settled general rule that concurrent jurisdiction exists "where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case." See Bradley, J., in *Clafin v. Houseman*, 93 U. S. 130, 136 (23 L. Ed. 833, 838). In the argument leading up to this conclusion, the court, in the cited case, says: "Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws may be prosecuted in the state courts and also, if the parties reside in different states, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts or in the state courts competent to decide rights of the like character and class," subject, of course, to the right of the United States in the latter class of cases to make the jurisdiction of the Federal courts exclusive by proper declaration to that effect or by necessary implication. The Federal statute here being considered does not in express terms exclude the jurisdiction of the state courts; but, applying the familiar rule that where the statute creates a new right and in the same connection specifies a remedy for its protection or enforcement, such remedy is to be deemed exclusive, it has been held that the effect of section 9 of the Interstate Commerce Act, giving to the shipper

who seeks to recover damages from a carrier for the violation of the statute the right to lay his complaint before the commission or to bring suit in the United States district court, is to negative the right to resort to a state court for the recovery of such damages. *Van Patten v. Chicago, M. & St. P. R. Co.*, 74 Fed. 981; *Darnell v. Illinois Cent. R. Co.*, 190 Fed. 656; *Mitchell v. Pennsylvania R. Co.*, 230 U. S. 247; *Texas & Pac. R. Co. v. Abilene*, 204 U. S. 426.

Conceding the authority of these precedents, we have then to inquire whether the case before us is an action to recover damages for a violation of that statute within the meaning of the provision to which we have referred. If the controversy were one over the reasonableness of the scheduled rates established and published by the carrier, it is very clear, as already said, that this inquiry would have to be answered affirmatively. It is contended for the plaintiff, however, that an action to recover the amount of an overcharge wrongfully exacted is not an action for the recovery of damages within the meaning of the cited sections of the statute and may, therefore, be maintained in the state court under the general rule as to concurrent jurisdiction of Federal and state courts, and under section 22 of the Interstate Commerce Act, which provides that nothing therein shall abridge or alter other remedies then existing by common law or by statute. That there is a distinction between the recovery of the amount of an overcharge improperly exacted and a claim for the recovery of damages within the meaning of the statute is recognized by the court in *Pennsylvania R. Co. v. International*, 230 U. S. 184, to which reference has already been made. It is there said, "The English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate, it could have recovered the excess, not as damages but as overcharge." It was at least an implied term of the contract for the transportation of shipments to plaintiff that the rates charged should be those specified in the car-

rier's schedule; and if, upon the transportation being completed, defendant charged and exacted an amount in excess of such rate, the wrong so perpetrated was not merely a violation of the statute, for which damages, in the usual sense of an unliquidated demand for compensation, were recoverable by the plaintiff, but the obligation to repay such exaction became, in a very just sense, a debt due from defendant to plaintiff for the specific amount of the excess. The contract between the parties was valid, and whatever was exacted or extorted in excess of that rate was received by the defendant to plaintiff's use. Plaintiff could therefore waive the tort and sue upon defendant's implied obligation to return the excess on demand. The right to recover for money unlawfully exacted or extorted is not a right created by this statute—it is a right which is as old as the common law itself. *Warner v. Commack*, 37 Iowa 642.

That an obligation of this nature may be treated as debt as distinguished from damages, see *Watson v. McNairy*, 4 Ky. (1 Bibb) 356; *Rhodes v. O'Farrell*, 2 Nev. 61; *Gray v. Bennett*, 44 Mass. 522, 526. This court has expressly recognized the distinction and held that an action to recover from a carrier the amount exacted in excess of the scheduled rates of freight is not a suit to recover under the provisions of the Interstate Commerce Act, but rather an action for the repayment to him of a sum of money exacted and received by the defendant in violation of the contract of shipment. *Banner v. Wabash R. Co.*, 131 Iowa 405. This decision is directly in point with the case now presented; and unless we are to abandon it as a precedent, it governs the disposition of this appeal. Upon the theory of that opinion, the action in this case involves no attempt by the state or the state courts to regulate interstate commerce, nor is it an attempt by the state court to enforce the Federal Commerce Act. These views are fully supported by the very recent cases, *Pennsylvania R. Co. v. Puritan*, 237 U. S. 121, and *Illinois Central R. Co. v. Coal Co.*, 238 U. S. 275, which have come to our

attention since the first draft of this opinion. The case of *Gatton v. Chicago, R. I. & P. R. Co.*, 95 Iowa 112, relied upon by appellee, is not in point. The charge there made was not that the carrier had collected more than the proper scheduled rates, but rather that it had in fact collected from plaintiff freight charges based upon the regular schedule, while performing like service for others at a lesser rate, and thereby was guilty of unjust discrimination, because of which damages were claimed. This brought the case strictly within the rule of the Federal cases above cited, and the court properly held the state tribunals to be without jurisdiction. Except in the *Banner Case*, *supra*, we find none of our precedents dealing with facts substantially like those disclosed in this record.

Some of the state courts, as well as some of the inferior Federal courts, have reached a conclusion in harmony with the position taken by appellee. See *Siggins v. Chicago & N. W. R. Co.*, (Wis.) 140 N. W. 1128, and cases there cited. But we find no case in which the Supreme Court of the United States has gone to that extent. On the other hand, sister courts of very respectable standing are in accord with our conclusion. *Pine Tree Lumber Co. v. Chicago, R. I. & P. R. Co.* (La.) 49 So. 202; *St. Louis, etc., R. Co. v. Roff*, (Tex.) 128 S. W. 1194; *Chicago, R. I. & P. R. Co. v. Lumber Co.*, 99 Ark. 105; *American Sugar Refining Co. v. Delaware, etc. R. Co.*, 207 Fed. 733. We are disposed, therefore, to adhere to our former holding, and this of necessity calls for a reversal of the judgment below.

We have attempted no discussion of the twenty-second section of the act, which in terms preserves existing remedies which the shipper theretofore had against the carrier. The effect of this provision is naturally limited to the preservation only of such rights and remedies as are not inconsistent with the rules and regulations prescribed by the act. To that extent at least, the right of the shipper to sue in the state courts remains as before. *Adams Express Co. v. Cron-*

inger, 226 U. S. 491. We can discover nothing in which the right to sue in a state court to enforce a return of money exacted in excess of the established schedule is in the least inconsistent with the regulatory authority of the commission or the terms of the statute itself. The reason which the Supreme Court assigns for holding that the act excludes the jurisdiction of the state courts for the recovery of damages growing out of the violation of the statute is that the act is evidently intended to grant the power to deal with the reasonableness of rates to the commission alone, and thereby secure uniformity and consistency of regulation which would not be practicable if the various courts were allowed to entertain jurisdiction of such proceedings. It is very manifest, we think, that cases of this class are not within the reason of the restriction. In taking cognizance of such an action and trying the rightfulness of such claim, the courts do not and cannot assume to pass upon the reasonableness of the established rates of freight. They accept the schedules as valid, and the sole inquiry is whether the carrier has extorted from the shipper anything in excess thereof. The exercise of jurisdiction in such case can in no manner tend to the ill results above suggested and, in the absence of an express exclusion of the state court, its right to hear and dispose of such controversies would seem to have been preserved.

Without extending this opinion for more particular consideration of the propositions argued by counsel, we have to say that we find no sufficient reason for a departure from our former holding, and the ruling of the trial court in sustaining the demurrer to the petition and entering judgment in defendant's favor is—*Reversed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

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- 2 of trial at law. When, in an action involving law and equitable issues, the equitable issue is properly on trial before the equity court and *may* be determinative of the entire controversy, a motion, made before the close of *all* the evidence, to separate the issues and for a law trial on the law issue, is premature and, such motion being overruled, a failure to renew it at the close of *all* the evidence works a waiver of any objections to the entire case being tried to the court. *Day v. Dyer*, 437.

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- 1 ciency of proposition submitted. "The time of the taking effect" of a tax in aid of the building of a courthouse, within the meaning of Sec. 446, Sup. Code, 1913, is sufficiently stated in the proposition submitted to the voters by a provision that said tax shall be levied "year by year . . . until said bonds and interest are completely paid." *Wells v. Boone County*, 377.

Bonds: Submission of question: Matters which may be omitted.

- 2 Secs. 443-450, Code, 1897, covering the manner of submitting questions to a vote of the people and requiring that "the whole question" shall be submitted, neither contemplates nor requires that each and every detail of the question be submitted to the people. Some matters must necessarily be left to the financial agents of the county. For instance, on the question whether a county shall issue bonds for a courthouse, neither (a) the denomination of the bonds nor (b) the rate of interest thereon need be submitted to the people. *Wells v. Boone County*, 377.

PUBLIC BUILDINGS.**Courthouse site: Discretionary powers of board. The wide dis-**

- 3 cretionary powers of the board of supervisors in the selection of a site for a courthouse will not be interfered with in the absence of some showing of a wanton or unreasonable exercise of the power. *Wells v. Boone County*, 377.

COUNTIES Continued

TO

CRIMINAL LAW

CONTRACTS.

Erecting courthouse: Contract: Validity: Competitive bidding:

- 4 **Fraud.** The contract for drawing the plans for a contemplated courthouse is not rendered invalid because of the insertion therein of a provision giving the draftsman the right to bid on such construction and providing that, if he was awarded the contract, the cost of the plans should be included in and made a part of the cost of erection, no fraud being claimed and no impediment to competitive bidding being shown. *Wells v. Boone County*, 377.

COURTS.

RECORDS.

Control over record: Appeal from justice of the peace: Setting

- 1 **aside affirmance.** A judgment, entered under a misapprehension of facts *upon which the right to enter any judgment exists*, may be set aside by the court at any time during the term at which it is made and before it is signed by the judge. (Sec. 243, Code.) *Miller v. Bryson*, 354.

JURISDICTION.

Federal and state courts: Concurrent jurisdiction: Interstate

- 2 **freight overcharges: Recovery.** The right to recover interstate freight charges, in excess of the duly established and published schedules of rates, may be enforced in a state court. Resort to the Interstate Commerce Commission or to the Federal courts is not required. Such action is not one for the recovery of *damages*, within the meaning of Sec. 9 of the Commerce Act (24 Stat. 379), but is an action for *debt*, and in no wise trenches on the regulatory rate powers of the commission. *Coad v. Ry. Co.*, 747.

CRIMINAL LAW.

INCLUDED OFFENSES.

Trial: Instructions: Included offenses: Duty-to-submit-rule:

- 1 **Rape.** An included offense must be submitted to the jury (1) When such included offense is charged in the indictment, and (2) when the record contains evidence justifying the jury

CRIMINAL LAW Continued TO DEEDS
 in finding the accused guilty of such included charge and
 offense rather than of some higher offense. *State v. Perkins*, 1.

DAMAGES. See FRAUD; TRIAL (UNDER VERDICTS); VENDOR
 AND PURCHASER, 1.

MEASURE OF DAMAGES.

Exchange of property: Payment in second-hand property: Par-
 1 tial default. He who buys property at an agreed price and
 agrees to pay for it in certain identified second-hand property,
 invoiced at wholesale cost, and *fails to reserve the right to*
make up any deficiency in other similar second-hand property,
 must, under an agreement implied by law, in case said second-
 hand property fails to invoice to the agreed purchase price,
 make up the deficiency, by paying a dollar in cash for each
 dollar of deficiency, and not an amount equal to the *actual*
money value of the second-hand property of which there was
 a deficiency. *Brunsvold v. Medgorden*, 413.

DEDICATION.

NATURE AND REQUISITES.

Essential elements: Intent to dedicate: Actual dedication: Ac-
 1 ceptance. To constitute an express or implied dedication of
 land to public use, there must exist (a) an actual intent
 to set aside the physical property to public use, evidenced
 by unequivocal and convincing evidence, (b) an actual setting
 aside of the physical property to public use, *in praesenti*, and
 (c) an express or implied acceptance *in praesenti* or *in futuro*
 by the public, of the dedication. Evidence reviewed and held
 not to be of that character sufficient to establish dedication
 of land for a public street. *DeCastello v. City*, 18.

DEEDS.

DELIVERY.

Inability of grantor to recall. A deed once delivered cannot be
 1 recalled without the consent of the grantee. *Stickles v. Town-*
send, 697.

Evidence: Sufficiency. Evidence reviewed and held to sufficiently
 2 establish the delivery of a deed to grantee. *Stickles v.*
Townsend, 697.

DEPOSITIONS

TO

DRAINS

DEPOSITIONS. See TRIAL, 2.

ADMISSIBILITY.

Admissibility by party other than taker: Order of proof. A
1 deposition taken by defendant to sustain his defense may
be introduced by plaintiff in chief. No rule against the order
of proof is thereby violated. Wiley v. Dean, 75.

DIRECTED VERDICTS. See TRIAL, 3, 3a.

DIVORCE. See HUSBAND AND WIFE.

GROUND.

Cruelty: Physical violence: Circumstances excusing. Evidence
1 reviewed and *held*, in view of extenuating circumstances, not
to justify a divorce on the grounds of cruelty. Wiley v.
Wiley, 390.

Cruelty: Questionable conduct of spouse excusing violence. The
2 violent language and conduct of the husband toward his wife
may find excuse, though not justification, in the fact that
she, by her own questionable conduct, has given him strong
grounds to doubt her chastity. Wiley v. Wiley, 390.

DECREE.

Defective decree: Dismissal of proceeding: Effect on subsequent
3 **action.** A signed but unrecorded decree of divorce, subse-
quently set aside and the proceeding dismissed, is a nullity
and has no bearing on a subsequent divorce proceeding. Wiley
v. Wiley, 390.

DRAINS.

ESTABLISHMENT.

Drainage district: Efficiency: Benefits commensurate with costs.
1 Evidence reviewed and held to show that the drainage scheme
in question was practicable and would benefit the lands to
an appreciable extent. Henderson v. Board, 499; Chicago,
etc., v. Board, 741.

DRAINS Continued

TO

EMINENT DOMAIN

ASSESSMENT OF BENEFITS.

Railway right of way: Assessment of benefits: Elements con-
2 **sidered.** In the assessment of a railway right of way for the cost of a public drain, it was held proper to consider the following elements of benefit, viz., (a) The greater ease and lessened expense of maintaining the right of way, (b) the greater permanence and security of embankments, (c) the increased life of all wooden materials, (d) the opportunity to substitute drainage pipe in lieu of trestles, and (e) the increased value of the acreage of the right of way, without reference to the fact that it was used for railway purposes. Chicago, etc., v. Board, 741.

Equality of burden: Railway right of way. Special assessments
3 **should be so levied that approximate equality of burden is attained.** Therefore, in assessing the cost of a drainage improvement, it was improper to so assess a railway right of way as to entirely absorb the benefits, while adjoining farm lands were so assessed as to absorb only one-half or less of the benefits. In such case, held proper for the lower court to scale down an assessment of \$1,500 on a railway right of way to \$800. Chicago, etc., v. Board, 741.

DUE PROCESS. See CONSTITUTIONAL LAW, 7.

DURESS. See BILLS AND NOTES, 2, 5-8.

ELECTIONS. See COUNTIES.

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, 5.

STRICT CONSTRUCTION OF POWER.

Statutory right to condemn: Mining lands. A coal mining com-
1 **pany having access to its mining lands, in part by a public way and in part by private way, cannot condemn a right of way for a railway to its said lands, under Secs. 2028, Sup. Code, 1913, and 2031, Code, said sections clearly limiting such right to him who has no "public or private way" thereto. Especially is this true in view of the rule that statutes conferring the power of eminent domain are to be strictly construed in favor of the private owner. Fisher v. Coal Co., 486.**

EQUITABLE PROCEEDINGS TO **EVIDENCE**
EQUITABLE PROCEEDINGS. See **ACTIONS**, 1, 2.

ESTATES OF DECEDENTS. See **EXECUTORS AND ADMINISTRATORS**.

ESTOPPEL. See **APPEAL AND ERROR**, 13-18; **INSURANCE**, 3, 10, 11; **JUDGMENT**, 1.

EQUITABLE ESTOPPEL.

Laches: Belated claim: Assumption of mortgage debt. Long
 1 delay in making complaint as to the correctness of a contract, while enjoying the benefits thereunder, may preclude one from questioning the correctness of such contract. *Bennett v. Smith*, 405.

EVIDENCE. See **FRAUD**, 6; **INSURANCE**, 13; **INTOXICATING LIQUORS**, 2, 3; **NEGLIGENCE**, 13; **TRIAL**, 1; **WILLS**, 4, 5, 6; **WITNESSES**, 3, 4, 5.

RELEVANCY, MATERIALITY AND COMPETENCY.

Real estate values: Selling price as evidence. When a purchase
 1 and resale of real estate are practically simultaneous, the price at which the land was first purchased is admissible evidence of its value when resold. *Wiley v. Dean*, 75.

BEST AND SECONDARY.

Originals beyond jurisdiction of court: Copies. The production
 2 of original evidence is excused when such original is beyond the jurisdiction of the court and the possessor declines to part therewith, beyond permitting the officer taking the deposition to make copies thereof. In such case, copies duly certified by such officer as correct are admissible. *Geddes v. McElroy*, 633.

Due diligence to produce best evidence. "The best evidence attain-
 3 able," while a dominant law of evidence, requires no more than due diligence. After exhausting due diligence to produce the primary, a litigant has a right to use the secondary evidence. *Simons v. Petersberger*, 564.

Notice to produce original: When not necessary. When the
 4 adverse party is the only one who could have the possession

EVIDENCE Continued

of original papers, and such party bases his defense on the claim that he never received such papers, notice to produce is not necessary. So *held* in case of proof of loss under policy of insurance. *Black v. Grain, etc., Ins. Co.*, 309.

ADMISSIONS.

Inconsistent conduct: Admissions against interest. Conduct of
5 a party inconsistent with his present contention is competent as tending to show that his present contention is an after-thought and a pretense. *Geddes v. McElroy*, 633.

DECLARATIONS.

Self-serving declarations: Non-conclusiveness. He who introduces
6 the self-serving declarations of his adversary is not bound thereby. *Geddes v. McElroy*, 633.

PAROL AS AFFECTING WRITING.

"Parol evidence" rule: Contracts partly written, partly oral:
7 **When oral part provable: Warranty.** A contract may be partly in writing and partly in parol. If the parol part is concerning a matter not covered by the writing, then, the written and parol parts being harmonious, the parol part may be shown along with the written. *Held*, an oral warranty might be shown along with the written part of the contract. *Fudge v. Kelley*, 422.

"Parol evidence" rule: Written warranty foreclosing oral war-
8 **ranty: When rule inapplicable.** Assuming the rule that a written warranty forecloses further inquiry as to warranties, yet the rule does not apply when the written warranty was inserted by accident, gratuitously, not as a part of the real transaction, and without consideration. *Fudge v. Kelley*, 422.

"Parol evidence" rule: Nonapplication of rule: Searching for
9 **intention of parties.** The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument does not, *in the search for the questionable intention of the parties*, close the door to oral evidence which is not inconsistent with the writing. *Thompson v. Thompson*, 583.

"Parol evidence" rule: Merger of prior oral contract: Agreement
10 **to will: Articles of adoption.** An oral contract to give and

EVIDENCE Continued

TO

EXCEPTIONS

to will all of one's property to a child, if the parent of said child will permit the promisor to adopt said child, is not merged in subsequently prepared articles of adoption, drawn in strict compliance with the statute and signed and acknowledged by the parent of the child and the adopting parties, but not recorded by the adopting parties, *said articles containing no provision as to property rights*. Horner v. Maxwell, 660.

OPINION EVIDENCE.

Real estate values: Witness: Competency: Hearsay. Competency to speak of real estate values may be based (a) on what has been learned in talking with others, (b) on observation and (c) on general knowledge of the subject. Wiley v. Dean, 75.

Suitableness of neckyoke. A blacksmith, shown to be qualified, may properly testify that a certain neckyoke was suitable for use to which it was being put and was the best made. Miller v. Harrison County, 270.

Overloading stock cars. Witnesses familiar with the cars carrying the stock shipment in question may give their opinion as to the number of cattle which may be loaded into a car without overloading the same. Colsch v. Ry. Co., 78.

Physicians: Probable result of injuries. A physician who has personally examined and treated an injured person may give an opinion as to what will be the natural and probable result of the injuries. Miller v. Harrison County, 270.

Negligence: "Belief" as to absence of danger: Competency. One's "belief" as to the absence of danger may be competent testimony. For instance, one may properly testify that, in proceeding toward a street railway crossing, with an approaching car in sight, he "believed there was no danger." Flannery v. Interurban Co., 238.

Conclusions: Exclusion. Questions calling for the mere conclusion or speculation of a witness should be excluded. Flannery v. Interurban Co., 238.

EXCEPTIONS. See APPEAL AND ERROR, 3.

EXCHANGE OF PROPERTY TO EXECUTORS AND ADMINISTRATORS
EXCHANGE OF PROPERTY. See DAMAGES, 1.

RESCISSION.

Fraud. Evidence reviewed, and *held*, plaintiffs had the right to
1 rescind a contract for the exchange of properties, especially
in view of defendant's conduct in corrupting plaintiffs' agent.
Stromberg v. Alexander, 707.

EXECUTORS AND ADMINISTRATORS.

SPECIAL ADMINISTRATORS.

Appointment: Briefness of tenure: Effect. The fact that the
1 tenure of office of a special administrator will be very brief
may have bearing on the necessity to review the appointment
but presents no reason for reversing the appointment. In re
Estate Ellenberger, 225.

Propriety of appointment: Discretion of court. The mere fact
2 that there is some evidence that the application for the ap-
pointment of a special administrator is not made in good
faith but for the attainment of purposes not authorized by
law (Sec. 3299, Code, 1897) is not necessarily sufficient to
overthrow an appointment. The legal discretion of the lower
court to refuse or to grant the appointment will not be inter-
fered with in the absence of a showing of abuse of such dis-
cretion. In re *Estate Ellenberger*, 225.

Appointment: Probate of will suspended by contest: Effect.
3 The filing of a contest of a will prior to the probate thereof
has the effect of suspending the immediate probate of said
will and authorizes the appointment of a special adminis-
trator under Sec. 3299, Code, 1897. In re *Estate Ellenber-*
ger, 225.

Appointment: On what evidence determined: Merits of will con-
4 **test.** On the question whether a special administrator should
be appointed pending the determination of a will contest, the
court should not assume to try out the merits of the will
contest. In re *Estate Ellenberger*, 225.

Basis for appointment: Prevention of loss: Incompetency of
5 **those possessing estate.** The right to appoint a special admin-
istrator rests on a fair showing of necessity to protect the

EXECUTORS AND ADMINISTRATORS Continued to**EXTRADITION**

estate from loss by the appointment of a disinterested and competent administrator. Such showing may involve some inquiry into the lack of capacity and the presence of undue influence on the part of those claiming the estate and in charge thereof. Appointment sustained in case at bar. In re Estate Ellenberger, 225.

Restraining order pending appeal. It is suggested that, in view
6 of the statute (Sec. 3299, Code, 1897), an order restraining a special administrator from the performance of duty, pending an appeal from the order of appointment, ought not to be entered. In re Estate Ellenberger, 225.

EXTRADITION.**FUGITIVE FROM JUSTICE.**

Facts constituting. The old rule that, to constitute one a fugitive
1 from justice, he must actually flee from the state in order to avoid prosecution, has long ago been abandoned. A "fugitive from justice," within the meaning of Federal law, is one who commits a crime within one state jurisdiction and, when called to answer therein, is not there—that is, has removed, it matters not in what manner or for what purpose, to another state jurisdiction. Leonard v. Zweifel, 522.

DUTY OF EXECUTIVE.

Guilt or innocence of accused. It is not the duty or even the
2 right of the governor to pass upon the question of the guilt or innocence of one sought to be extradited as a fugitive from justice. His duty is discharged when he determines (a) that an extraditable offense has been regularly charged and (b) that the accused was within the jurisdiction of the demanding state when such offense was committed. Leonard v. Zweifel, 522.

DUTY OF COURTS.

Habeas corpus: Motive of prosecution. When a requisition is
3 made in due form and honored by the governor, it is not within the province of the court upon habeas corpus to inquire into the motive which actuates the prosecution in the foreign state. Leonard v. Zweifel, 522.

FEDERAL EMPLOYERS' LIABILITY ACT TO
FEDERAL EMPLOYERS' LIABILITY ACT. See MASTER
 AND SERVANT, 1. FRAUD

FRAUD. See BILLS AND NOTES, 2, 5-8; REFORMATION OF
 INSTRUMENTS, 2; SALES, 1, 2.

ACTS CONSTITUTING.

Fraudulent representations: Action for damages: Scienter: Ne-
 1 **cessity to show: How shown.** A demand, either in law or
 equity, for *damages* by reason of alleged fraudulent repre-
 sentations must be supported by evidence establishing (a)
 that the representations were *false* to the actual knowledge
 of the one asserting them to be true or (b) that the repre-
 sentations were *false* and, with the intent to deceive, were
 recklessly asserted to be true without knowledge whether they
 were true or false, or (c) that the representations were *false*
 and were made under any other condition which would be
 the equivalent of *scienter*. Evidence reviewed in an action for
 damages for false representations in a sale of lands, and held
 to establish the *scienter*. *Richards v. Fredrickson*, 669.

Representations as to value: When actionable. Representations
 2 **as to value may constitute actionable fraud when the parties**
 do not have equal opportunity to know the truth, and the
 one with superior opportunity makes the representations, in-
 tending them to be taken as a fact and as an inducement to
 the sale. *Van Vliet, etc., v. Crowell*, 64.

Representations: Statements as to value: Opinion. Certain
 3 **statements held to be simply matters of opinion and to fur-**
 nish no basis for a charge of fraud. *Bennett v. Smith*, 405.

Scienter: Sufficiency of evidence to show. Evidence reviewed
 4 **and held sufficient to carry the question of scienter to the**
 jury. *Van Vliet, etc., v. Crowell*, 64.

ACTIONS.

Contract induced by fraud: Affirmance: Right to recover dam-
 5 **ages.** Affirmance of a contract after full knowledge that it
 was induced by fraud bars the right to rescind, but waives
 neither the fraud nor right to recover damages. For in-
 stance, one fraudulently induced to buy a note secured by

FRAUD Continued

TO

FRAUDS, STATUTE OF

mortgage may affirm the contract after learning of the fraud, foreclose the mortgage, and recover the deficit in damages. Van Vliet, etc., v. Crowell, 64.

EVIDENCE.

Character of land: Materiality on value. The "value" of land being a material issue in an action for false representation as to the value of the land, evidence as to the character of the land was admissible as bearing on value, even though plaintiff had withdrawn his charge of false representation as to the character of the land. Van Vliet, etc., v. Crowell, 64.

DAMAGES.

Measure of: False representations as to non-existing land. One who, in falsely representing the existence of land, pointed out what he claimed to be such land and estimated its value cannot object that the court, in assessing damages, adopted his estimate of the value, especially where there was other evidence that such estimate would have been correct had the land existed. Richards v. Fredrickson, 669.

Sale of real estate junior mortgage security: Damages: Value "when redemption expires." In actions for damages for fraud in the sale of land, the material inquiry is the value of the land "at the time of the sale." If, however, the action is for damages for fraud in the sale of a note secured by a *junior mortgage on land*, the material inquiry is the value of the land "at the time redemption from senior mortgage could be made," the parties clearly contemplating such redemption. Van Vliet, etc., v. Crowell, 64.

Purchase of secured note: Fraud: Affirmance: Action for damages: Worthlessness of security: Insolvency of makers: Necessity of proof. He who alleges damages must prove damages. For instance, the victim of a fraudulent contract for the purchase of a promissory note secured by mortgage, who affirms the contract and sues for damages, must show (a) the worthlessness of the security, and (b) the insolvency of the maker of the note. Van Vliet, etc., v. Crowell, 64.

FRAUDS, STATUTE OF.

PART PERFORMANCE.

Parol contract of employment: Taking contract out of statute: Part performance. A parol contract of employment, within

FRAUDS, STATUTE OF.

TO

GIFTS

the statute of frauds, is not a void contract but is unprovable. In so far as it has been performed, it has been taken out of the statute. *Hahnel v. Highland*, 492.

FRAUDULENT CONVEYANCES.**TRANSACTIONS INVALID.**

Conveyances: When vulnerable to attack. It is elementary that
 1 a conveyance cannot be overthrown in the absence of a showing of (a) fraud or (b) want of consideration. *Dickinson v. Davis*, 29.

GARNISHMENT.**LIEN OF GARNISHMENT.**

Rights acquired: Defendant in execution parting with interest: Corporate bonds. It is hornbook law that a garnishment reaches whatever interest the defendant in execution has in the property at the time the garnishment is served *and no more*. So held where the defendant in execution had, prior to the service of the garnishment, assigned all his interest in certain corporate bonds held by the garnishee as collateral security. *Dickinson v. Davis*, 29.

JUDGMENT.

Order not affecting plaintiff in execution: Futility of objection.
 2 A plaintiff in execution who, by his garnishment, reaches no property of the defendant in execution, because of a good-faith assignment of the property prior to the garnishment, cannot complain of an order of the court affecting the assignee only. *Dickinson v. Davis*, 29.

GIFTS.**REQUISITES IN GENERAL.**

How effected: Evidence: Intention. No stereotyped form of evidence is required in order to effect a gift. *Intention* is the pivotal question. In the instant case, it was held that a jury question whether a father intended to effect a gift to his son of certain notes was presented by (1) a series of uncon-

GIFTS Continued

TO

HABEAS CORPUS

ditional assignments of, and indorsements on, notes, (2) a power of attorney, (3) a receipt for said notes and (4) oral testimony in relation thereto. *Thompson v. Thompson*, 583.

GUARDIAN AND WARD.

SALES AND CONVEYANCES.

Sales under court order: Unknown easement: Caveat emptor.

- 1 *Caveat emptor* doctrine does *not* apply to sales by guardians under order of court. *Stonerook v. Wisner*, 109.

HABEAS CORPUS. See EXTRADITION, 3.

NATURE OF GROUNDS AND REMEDY.

Right to writ irrespective of statute: "Inebriate" act. The right

- 1 to the writ of habeas corpus is always present and available, not by virtue of any statute, but by virtue of the Constitution. (Sec. 13, Art. I.) Along with the right to demand the writ, under permissible regulations of law, and along with the right and duty of the court or judge to issue the writ, in a proper case, goes the right to determine every matter of fact upon which the legality of the imprisonment depends. Under the Inebriate Act, and under a commitment "until cured and not exceeding three years," *held* that the superintendent of the hospital did not have the exclusive right (Sec. 2310-a3, Sup. Code, 1907) to determine when the patient was cured, and that such question could be determined on habeas corpus. *Addis v. Applegate*, 150.

JURISDICTION, PROCEEDING AND RELIEF.

Application for Writ: Venue: "Judge most convenient in point

- 2 of distance." One seeking to test the legality of his imprisonment by habeas corpus may consult his own convenience as to the venue by applying for the writ to *any* district judge of the state (Sec. 4419, Code, 1897), howsoever remote such judge may be from the place of imprisonment, alleging that such judge is the "most convenient in point of distance" to *him* (Sec. 4420, Code, 1897), even though there may be other judges nearer in point of distance to such place of imprisonment; and if such judge deems the application sufficient, even erroneously, he has jurisdiction to issue and determine a writ running into any part of the state. *Addis v. Applegate*, 150.

HUSBAND AND WIFE Continued **TO** **INSURANCE**
 husband. It is not "necessary" for the protection of a wife
 that she be defended against charges of misconduct which
 are true. *Wick v. Beck*, 115.

INEBRIATE ACT. See **HABEAS CORPUS**.

INJUNCTION. See **EXECUTORS AND ADMINISTRATORS**, 6;
MUNICIPAL CORPORATIONS, 1.

INTERLOCUTORY RESTRAINING ORDERS.

Orders pending appeal: Effect on final decision: Res judicata.

1 Interlocutory restraining orders issued by one of the judges
of the Supreme Court have no bearing on and in no manner
control the final decision on appeal. *In re Estate Ellenber-*
ger, 225.

INSTRUCTIONS. See **CARRIERS**, 1, 4, 6, 7; **CRIMINAL LAW**,
1; **MASTER AND SERVANT**, 7; **NEGLIGENCE**, 14; **RAILROADS**,
1; **TRIAL**.

INSURANCE. See **LIMITATION OF ACTIONS**.

INSURABLE INTEREST.

Homestead in property. A homestead interest in property is an
1 insurable interest. *Funk v. Insurance Co.*, 331.

PREMIUMS, DUES AND ASSESSMENTS.

Policy payable through assessments: Remedy available. An ac-
2 tion in equity is the only available remedy to enforce the
payment of a policy of insurance payable through assessments.
Johnson v. Hawkeye, etc., 425.

Payment: Estoppel. Evidence reviewed and held to justify a
3 finding that premiums on a policy of insurance had been paid,
or if not paid, that the company was estopped to so claim.
Black v. Grain, etc., Ins. Co., 309.

CANCELLATION OF POLICY.

Question of fact. Evidence reviewed and held to justify a finding
4 that a policy of insurance had not been cancelled. *Black v.*
Grain, etc., Ins. Co., 309.

INSURANCE Continued

AVOIDANCE OF POLICY.

Injured "when violating the law": Criminal act or trespass only.

- 5 Whether a violation of law within the meaning of a policy of insurance providing for non-liability in case the insured is killed or injured "when violating the law" must be criminal or may be a mere naked trespass to which no criminal consequences attach, *quaere*. Johnson v. Hawkeye, etc., 425.

Accident insurance: Non-liability "when violating law": Trespass.

- 6 The provision of an accident insurance policy, to the effect that the insurer shall not be liable if the insured is injured or killed "when violating the law," is not violated by the insured passing over a fence upon a railroad track at a point in the fence used daily by the public for many years. Johnson v. Hawkeye, etc., 425.

FORFEITURE OF POLICY.

Prohibited change of possession: Tenant. The fact that there is

- 7 some shadowy showing in the record that a party was in possession, at one time, of the insured premises, possibly as a tenant, is wholly insufficient on which to base a forfeiture under the clause of the policy that "if any change other than by death of the insured takes place in the possession of the property . . . the policy shall be void." Funk v. Insurance Co., 331.

Under mortgage foreclosure clause: Consent to mortgage: Effect.

- 8 A forfeiture of a policy of insurance cannot be predicated on a provision that the policy is voided, "if foreclosure proceedings be commenced . . . by virtue of any lien . . . " on the property, when the foreclosure complained of was of a mortgage to which the insurance company had consented. Funk v. Insurance Co., 331.

Foreclosure "with knowledge of insured": Service by publication:

- 9 Strict construction of policy. A policy of insurance, payable to a mortgagee, is not voided under a clause providing that "if, with the *knowledge of the insured*, foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy, by virtue of any lien . . . thereon, this policy shall be void," when, in the foreclosure proceedings and sale, service on the insured was by *publication* only. Constructive notice is not "knowledge" within the meaning of the policy. Funk v. Insurance Co., 331.

INSURANCE Continued TO INTOXICATING LIQUORS
ESTOPPEL AND WAIVER.

Warranties to be indorsed on policy. Evidence reviewed, and held
10 to justify a finding that an insurance company had waived the
provision of a policy requiring the warranty of the carrying
of other insurance *to be indorsed on the policy*. Black v. Grain,
etc., Co., 309.

Insured not "unconditional and sole owner": Knowledge. An insur-
11 ance company that issues a policy to one who has an insurable
interest in the property, but who, it knows, is not the "sole
and unconditional" owner, and collects the premium and later
makes the policy payable to a mortgagee, knowing that the
mortgagee was taking the policy as security for a loan, waives
absolutely, and is estopped to insist on, the provision of the
policy that the "policy shall be void if the interest of the
insured be other than unconditional and sole owner." Funk v.
Insurance Co., 331.

Condition of title: Knowledge of company through agent: Suffi-
12 ciency of evidence. A finding that an insurance company had
knowledge of the actual ownership of insured property is justi-
fied by a showing that the agent of the company (a) took
the acknowledgment of the deed which showed the condition
of the title and (b) prepared for the actual owner, and had
in his possession, an abstract of title to the property showing
the actual ownership. Funk v. Insurance Co., 331.

NOTICE AND PROOF OF LOSS.

Sufficiency of evidence. Evidence that proof of loss under a fire
13 insurance policy was made out, verified, and mailed to the
company, along with evidence on behalf of the company that
no proofs of loss were ever received, raises such a conflict in
the evidence that the jury or court findings thereon will not
be disturbed on appeal. Black v. Grain, etc., Ins. Co., 309.

INTERSTATE COMMERCE. See COURTS, 2.

INTOXICATING LIQUORS.

CONSTRUCTION OF STATUTE.

Evasions: Duty of court. The statute (Sec. 2431, Code, 1897), di-
1 recting such construction of the Intoxicating Liquor Act as will

INTOXICATING LIQUORS Continued **to** **JUDGMENT**
 prevent evasions of the act, neither authorizes nor permits arbitrary action against the accused, but it does emphasize the duty of the court to scrutinize the record to prevent evasion. Evidence reviewed, and held to support a conviction for contempt. *Wright v. District Court*, 596.

EVIDENCE—ADMISSIBILITY.

Violation of statute: Certified copy of federal tax receipt holders.

3 The certified copy, provided for in Sec. 2427-a, Sup. Code, 1913, of the names of those who have paid the Federal tax on the sale of intoxicating liquors is prima-facie evidence that such persons are selling and keeping for sale intoxicating liquors in violation of law. *Wright v. District Court*, 596.

Nuisance: Presumption from possession. The finding of intoxicat-

. 3 ing liquors in a drug store, the proprietor not having authority to sell the same, raises the presumption that they were possessed with the intent to sell the same in violation of law. (Sec. 2427, Code, 1897.) *Allshouse v. Carragher*, 307.

JOINDER. See **ACTIONS**, 3; **PARTNERSHIP**, 3.

JUDGMENT. See **COURTS**; **GARNISHMENT**; **JUSTICES OF THE PEACE**.

OPENING OR VACATING.

Void judgment: Action to annul: Laches: Estoppel. A judgment,

1 void because of lack of jurisdiction, may be set aside and formally annulled, even though the action to set aside is delayed until such a time that the statute of limitation has fully run on the indebtedness on which the judgment was based, no bad motive appearing to have actuated such delay, and the plaintiff in the action to set aside being under no obligation to speak. *Nibeck v. Reidy*, 54.

Void judgment: Condition to annulment: Payment of original

2 claim: Good defense. A void judgment may be set aside and formally annulled without payment or offer to pay the original bona fide claim on which the void judgment is based, when such original claim is barred by the statute of limitation. *Nibeck v. Reidy*, 54.

JUDGMENT Continued TO LIMITATION OF ACTIONS

Service of original notice: Validity. Service of original notice
3 is jurisdictional. *Held*, no legal service was made on the wife
of one of the defendants. (Sec. 3518, Code, 1897.) *Nibeck v.*
Reidy, 54.

JURISDICTION. See COURTS; JUDGMENT, 1, 3.

JURY. See TRIAL, 14.

RIGHT OF TRIAL BY JURY.

Waiver. He who proceeds to trial to the court without objection
1 waives his right to a jury. (Sec. 3733, Code, 1897.) *Bennett*
v. Smith, 405.

Equitable action: Injection of law issues by defendant: Right to
2 jury. A defendant who presents a law issue in an action
properly brought in equity has no right to a jury trial thereon.
Bennett v. Smith, 405.

JUSTICES OF THE PEACE. See COURTS, 1.

APPEAL—DEFAULT.

Failure to docket: Affirmance on appellee's motion: When erro-
1 neous. Appellee has no right, on appellant's appeal from a
judgment of a justice of the peace, to pay the docket fee and
to have an affirmance in the district court unless appellant
has been delinquent in two particulars, viz., (a) failure to
docket the cause by noon of the second *day* of the term and
(b) failure to pay the docket fee. (Sec. 4559, Code.) *Miller v.*
Bryson, 354.

LACHES. See JUDGMENT, 1; NEGLIGENCE, 3.

LIMITATION OF ACTIONS. See JUDGMENT, 1.

FRAUD.

Knowledge: Ordinary diligence required: Insurance policy. An
1 action for relief on the ground of fraud is barred after the
lapse of five years. (Sec. 3447, Par. 6, Code Sup., 1913) from
the time the fraud was (a) actually discovered or (b) ought
to have been discovered by the exercise of ordinary diligence.
Simmons v. Indemnity Co., 429.

MASTER AND SERVANT

MASTER AND SERVANT. See NEGLIGENCE.

THE RELATION—STATUTORY REGULATION.

Employment of servant: Sufficient evidence of: Federal Employers'

- 1 **Liability Act.** An employment "in interstate commerce" is essential to the maintenance of an action under the Federal Employers' Liability Act. Evidence held sufficient to show that plaintiff was such employee, and not a mere passenger, *Pelton v. Ry. Co.*, 91.

NATURE AND EXTENT OF MASTER'S LIABILITY.

Exoneration of servant ipso facto exoneration of master: Incon-

- 1a **sistent verdicts.** If the employee who actually does a thing is free from liability therefor, his employer must also be free from liability. Stated in another way: If the master is responsible for the act in question *solely* under the doctrine of *respondeat superior*, then an exoneration of the servant, who actually did the act *ipso facto* exonerates the master. *Hobbs v. Ry. Co.*, 624.

PLACE FOR WORK.

Mines: Failure to furnish props: Miner continuing work: Stat-

- 2 **utorily "safe": Negligence per se.** Whether a mine is "safe" within the meaning of our Mining Act, providing no miner shall work in his place "until it is made safe," depends on the facts ascertainable by reasonable diligence *before* the accident, and not on the *later* developments of the accident itself. In other words, if a miner makes an examination such as a reasonably cautious miner would make and discovers nothing that such a miner would deem unsafe, then the place is "safe," statutorily, and he may continue work, guiltless of negligence *per se*, even though an accident follows, demonstrating that in truth it was unsafe. (Secs. 2489-5a, 2489-16a, Sup. Code, 1913.) *Edgren v. Coal Co.*, 459.

Mines: Failure to prop roof: Injury: Facts essential to recovery.

- 3 A miner seeking to recover for injuries received from the falling of the roof of his mining place by reason of insufficient props thereunder must show:
 1. That he had requested the owner to furnish the props.
 2. That the owner had failed to do so within a reasonable time.
 3. That the owner's failure to furnish the props was the reason for his failure to prop the roof.

MASTER AND SERVANT Continued to **MERGER**

4. That upon "entering" his place of work, his first act was to diligently examine the said roof.
5. That the said examination revealed nothing to him that he deemed unsafe, and that he therefore believed it safe (Secs. 2489-5a, 2489-16a, Sup. Code, 1913.) *Edgren v Coal Co.*, 459.

METHODS OF WORK, RULES AND ORDERS.

Practical construction of: Riding on engine. A rule forbidding
 4 any person to ride on an engine, except employees in the discharge of their duty, has no application to a head brakeman when such place was the customary place where the head brakeman rode, when he was directed by the conductor to ride on the engine, and such had been the practical construction of the rule. *Pelton v. Ry. Co.*, 91.

ASSUMPTION OF RISK.

Dangers, obvious, known and appreciated: Failure to warn. Dangers
 5 obvious and known to and appreciated by the servant call for no warning from the master. Such dangers, incident to the work, are assumed by the servant. *De Graw v. Bettendorf*, 451.

Mines: Failure to furnish props: Miner continuing work. A miner,
 6 having requested the mine operator to furnish him props with which to prop the room in which he was working, does not, by continuing at his work, assume the risk arising from the operator's failure to furnish them. (Sec. 4999-a3, Sup. Code, 1913.) *Edgren v. Coal Co.*, 459.

CONTRIBUTORY NEGLIGENCE.

Instructions: Inadvertent omission. An instruction, intended to
 7 cover the subject of contributory negligence, but inadvertently omitting the word "negligence," held insufficient. *Edgren v. Coal Co.*, 459.

Mines: Unpropped roof: Miner continuing work. Evidence re-
 8 viewed and held not to show contributory negligence on the part of a miner working in a partially propped room. *Edgren v. Coal Co.*, 459.

MERGER. See **EVIDENCE**, 10; **MORTGAGES**, 1.

MINES AND MINING

TO

MUNICIPAL CORPORATIONS

MINES AND MINING. See EMINENT DOMAIN; MASTER AND SERVANT, 2, 3, 6, 7, 8.

MORTGAGES. See FRAUD, 8; INSURANCE, 8, 9.

MERGER AND EXTINGUISHMENT OF DEBT.

Intention. Merger implies two distinct estates meeting in the same
1 person at the same time. Then, again, merger is essentially bottomed on the matter of intention. *Held* that the facts furnish no ground for the application of the doctrine of merger. *Bennett v. Smith*, 405.

FORECLOSURE—VENUE.

Assignee assuming payment. An assignee of lands, who has as-
2 sumed the payment of the mortgage thereon, is not, in an action of foreclosure properly brought in the county where the land is situated, to which action he is a party, entitled to a change of venue to the county of his residence (Sec. 3504, Code, 1897), because (a) such assignee is a necessary party to the action (Sec. 3462, Code, 1897), and (b) such action to foreclose must be brought in the county where the land is situated. (Sec. 3493, Code, 1897.) *Bennett v. Smith*, 405.

MUNICIPAL CORPORATIONS.

PUBLIC IMPROVEMENTS—VALIDITY.

Sewerage system: Apprehended nuisance: Action to enjoin: Proof
1 **required.** Self-evidently there is a marked difference between (a) an action to enjoin an act which has happened and the results of which, being known, are subject to more or less definite conclusion, and (b) an action to enjoin that which has not happened and the results of which, being unknown, are conjectural, problematical, speculative. In the latter case, the court must not be asked to assume or presume a nuisance *per se*. Proof! Proof! is the demand of the law. So held and applied in the case of the proposed enjoining of the establishment of a city sewage disposal plant. *Thomas v. City*, 571.

DEDICATION AND ACCEPTANCE OF STREETS.

How shown. Acceptance of the dedication of a public street may
2 be shown by use, and recognition on the part of the city and

MUNICIPAL CORPORATIONS **TO** **NEGLIGENCE**
 public generally. Written acceptance by way of ordinance or resolution is not exclusive. (Sec. 751, Code, 1897.) *Louden v. Starr*, 528.

VACATION AND CONVEYANCE OF STREETS.

Disposal of vacated street: Review by courts: Arbitrary action. A
 3 city or town has undoubted power to vacate a public street (Sec. 751, Code, 1897) and, after vacation, to dispose of the land as it deems best (Sec. 883, Code, 1897), even by conveyance, for instance, to a railway company; and the exercise of such powers will be interfered with by the courts only in a clear case of arbitrary and unjust exercise of the power. In instant case, *held*, vacation not arbitrary. *Louden v. Starr*, 528.

Constitutionality of statute: Special laws. The legislative depart-
 4 ment, having plenary power over the highways of the state, may delegate to a city or town the power to vacate; therefore, Sec. 751, Code, 1897, investing *all* cities and towns with power to vacate, is not a *special* law within the meaning of Art. 3, Sec. 30, Constitution. *Louden v. Starr*, 528.

Power not conditioned on prior payment of damages: Constitu-
 5 **tional law.** The "vacation" of a public street is not a *taking* of private property for public use within the Constitution, Art. 1, Sec. 18, even though, as a consequence of such vacation, an abutting property owner is damaged. Such vacation may be legally ordered without *first* having the consequential damages, if any, to abutting property, assessed and paid or secured; therefore, Sec. 751, Code, 1897, is not unconstitutional because containing no provisions for first assessing and paying the damages consequent on vacation. *Louden v. Starr*, 528.

TAXATION.

City and Town Taxes: Agricultural lands. Lands in good faith
 6 occupied and used for agricultural purposes, and not subdivided into parcels of ten acres or less, are not taxable for general city and town purposes. (Sec. 616, Sup. Code, 1913.) *La Grange v. Skiff*, 143.

NEGLIGENCE. See **ANIMALS**; **BRIDGES**, 1; **CARRIERS**, 1-7; **EVIDENCE**, 15; **MASTER AND SERVANT**; **PARTNERSHIP**, 1; **RAILROADS**; **REMOVAL OF CAUSES**, 2; **STREET RAILROADS**, 1.

NEGLIGENCE Continued

ACTS OR OMISSIONS CONSTITUTING.

Care of premises: Duty to non-trespasser: Common carrier. One
 1 who, expressly or impliedly, invites people to come upon his premises must keep them in a reasonably safe condition, irrespective of his own convenience. So held where a former passenger, with the consent of the railway company, was waiting at a depot for a conveyance, and was injured by reason of a defect in the building. *Whitman v. Ry. Co.*, 277.

Congested street crossings: Right to use: Duty to choose new
 2 route. There is no arbitrary right to use at any and all times and under any and all circumstances all parts of a public street. Circumstances, and ordinary prudence in view thereof, are an ever-present limitation on the right. Circumstances often demand a stop and even a turning aside and the choosing of another route. So held where defendant drove an automobile across a congested street crossing. *Crawford v. McElhinney*, 606.

Laches: Knowledge presupposed: Actual and constructive knowl-
 3 edge contrasted. Less than *actual* knowledge cannot initiate negligent delay. In other words, one without fault in not obtaining actual knowledge cannot be guilty of *laches* for failing to act upon what he knows by construction only. So held where an amendment to a petition gave defendant the right of removal to Federal court, of which right defendant had constructive knowledge only. *Markey v. Ry. Co.*, 255.

Railroads: Personal injury: Negligence: Belated train. No pre-
 3a sumption of negligence arises from the naked fact that a train was behind its scheduled time. *Carrigan v. Ry. Co.*, 723.

Automobile accident: Evidence. Evidence reviewed and held to
 4 support a finding that defendant was negligent in the handling of an automobile in a crowded public street. *Crawford v. McElhinney*, 606.

LAST CLEAR CHANCE.

Evidence reviewed. Evidence reviewed and held to show no negli-
 5 gence rendering defendant liable under the doctrine of the "last clear chance." *Carrigan v. Ry. Co.*, 723.

COMMON ENTERPRISE.

Husband and wife. A husband and wife, engaged in a pleasure trip
 6 with invited guests and with an automobile owned by the hus-

NEGLIGENCE Continued

band and under his control but driven by the wife, are pursuing a "common enterprise." *Crawford v. McElhinney*, 606.

PROXIMATE CAUSE.

Statutory duty: Violation. The violation of a statutory duty does
7 not necessarily fix responsibility for an injury. The breach of duty must be the proximate cause of the damage to plaintiff. The connection of cause and effect must appear. *Carri-gan v. Ry. Co.*, 723.

Master and servant: Mines: Falling roof: Failure to furnish
8 props. When the roof of a mine fell because of the absence of props, the proximate cause of such fall may be deemed the mine owner's failure to furnish the props, it appearing that the miner had requested the props and would have installed them had they been furnished. (Secs. 2489-5a, 2489-16a, Sup Code, 1913.) *Edgren v. Coal Co.*, 459.

IMPUTED NEGLIGENCE.

When negligence will be imputed. The negligence of the driver of
9 a conveyance will be imputed to one riding with the driver (a) when both parties are engaged in a common enterprise, and (b) where the driver is engaged in an enterprise for the use and benefit of the other party or in the employ or under the control and direction of such other party, whether such other party exercises his power of control or not. *Crawford v. McElhinney*, 606.

Automobile accident: Wife as employee of husband: Negligence
10 of wife: Liability of husband. A wife engaged in the transaction of the business of the husband or the business of both of them, though only for their mutual pleasure, is the agent and employee of the husband, with consequent liability of the husband for the negligence of the wife. So held in an automobile accident. *Crawford v. McElhinney*, 606.

PLEADING.

Master and servant: Negligence: Action: Chosen grounds of negli-
11 gence: Failure to prove. It is hornbook law that a plaintiff must stand or fall on his chosen ground of negligence. *Thompson v. Packing Co.*, 579.

PLEADING

PLEADING. See **BILLS AND NOTES**, 1, 2, 4; **NEGLIGENCE**, 11-13; **REPLEVIN**, 1; **TRESPASS**, 1.

FORM AND ALLEGATIONS IN GENERAL.

Qualifying denial by "if." It is not allowable to qualify the denial or affirmation of an issuable fact by an "if." *Simons v. Petersberger*, 564.

Undue influence: Rescission: Failure to allege return of consideration: Nonprejudicial error. Even though a pleading did not formally allege an offer to return the consideration (assuming such to be necessary) received on a note transaction sought to be rescinded for undue influence and want of consideration, such omission was immaterial when, on conflicting evidence, the jury found both undue influence and want of consideration. *Geddes v. McElroy*, 633.

Discredited pleading under new phraseology: Effect. Dressing up an old, discredited and successfully assailed pleading in new phraseology and refiling it cannot have the effect of giving to such pleading any new or added standing. *Simmons v. Indemnity Co.*, 429.

CONSTRUCTION.

Insufficient pleading treated as sufficient: Waiver. The practical construction which parties place on the sufficiency of pleadings is conclusive. *Geddes v. McElroy*, 633.

Want of consideration: Sufficiency. Certain pleading held to sufficiently plead want of consideration. *Geddes v. McElroy*, 633.

ANSWER—WHEN NOT NECESSARY.

Petition followed by general denial: Amendment increasing prayer for damages: Non-necessity for new answer. An answer denying generally plaintiff's alleged cause of action and all damages automatically applies to a subsequent amendment to the petition which simply increases the demand for damages, thereby rendering needless any additional answer. *Markey v. Ry. Co.*, 255.

PLEADING Continued
AMENDMENTS.

TO

PRINCIPAL AND AGENT

Substituting partnership entity for individual plaintiff. The pleadings in an action on a partnership claim, improperly brought in the individual name of one of the partners, may be amended during trial by substituting the partnership entity as plaintiff. Nonsuits upon purely technical grounds are not favorites of the law. *Van Dyk v. Mosterd*, 3.

ISSUES CONTROLLING RELIEF.

Matter not in issue: Relief. The court cannot assume to accord relief on matters not in issue—for instance, an attaching plaintiff, pleading at all times in defense of his right to hold certain property under an attachment, cannot be awarded the proceeds of collateral securities, not covered by the levy, but turned over to him after the attachment, and later delivered by him, on demand, to a receiver of the property, no issue as to this collateral being made in the pleading. *First Nat'l Bank v. Acme, etc., Co.*, 474.

POLICE POWER. See CONSTITUTIONAL LAW, 2.

PRESUMPTIONS. See APPEAL AND ERROR, 12; CORPORATIONS, 1; INTOXICATING LIQUORS, 3.

PRINCIPAL AND AGENT. See NEGLIGENCE, 10.

THE RELATION—EVIDENCE.

Sufficiency. Evidence reviewed and held sufficient to show, in an action for damages for misrepresentations in the sale of land, that the party making the misrepresentations was the agent of the one owning and selling the land. *Richards v. Frederickson*, 669.

OSTENSIBLE AGENT.

Ostensible authority of agent: Facts not showing. An agent has “ostensible authority” to do a certain act in the name of his principal when the conduct of the principal is such as to induce a third person to believe, in good faith, that the agent has been given authority to do such act. *Held*, such authority was not shown. *Hosteter v. Shoe Co.*, 346.

PRINCIPAL AND AGENT Continued TO
LIEN OF AGENT.

REDEMPTION

Expenses and advancements: Replevin. An agent has a particular
3 lien upon the goods of the principal lawfully in his possession
as agent for the amount due him as agent in respect to the
property subject to the lien. *Jessen v. Phoenix*, 505.

UNAUTHORIZED ACT OF AGENT.

Ratification. Ratification is the confirmation of a voidable act. One
4 who knows that an unauthorized contract has been made in
his name must promptly repudiate. Accepting the benefits of
such unauthorized contract will work a ratification. *Held*,
ratification sufficiently shown. *Hosteter v. Shoe Co.*, 346.

PRIVILEGED COMMUNICATIONS. See WITNESSES.

RAILROADS.

ACCIDENTS AT CROSSINGS.

Personal injury: Negligence: Lookout: Rule of duty. It is pure
1 speculation to charge the jury that a carrier, in approaching a
crossing, must keep a lookout for horses which "*might take*
fright." *Carrigan v. Ry. Co.*, 723.

"Stop, look and listen" rule inapplicable when train is seen: Street
2 **railroads.** The "stop, look and listen" rule has no application
where the injured person saw the approaching train, the issue
being whether he acted with reasonable prudence in attempting
to cross the track ahead of the train. *Flannery v. Interurban*
Co., 238.

Crossing railway track ahead of approaching car: Street railroads.
3 Observing an approaching car as one nears a street railway
crossing does not, on the question of negligence, necessarily
demand a stop and wait before attempting to cross. *Flannery*
v. Interurban Co., 238.

RATIFICATION. See CORPORATIONS, 1; FRAUD, 5; PRIN-
CIPAL AND AGENT, 4.

REDEMPTION. See FRAUD, 8.

REFORMATION OF INSTRUMENTS TO REMOVAL OF CAUSES
REFORMATION OF INSTRUMENTS.

GROUND—MISTAKE.

Mutual intention frustrated through mutual mistake: Sufficiency
1 of showing. Mutual mistake frustrating mutual intention establishes right to reformation. *Day v. Dyer*, 437.

FRAUD OF APPLICANT.

Sufficiency of evidence: Fraud. The court will be slow to decree
2 specific performance on the application of one who is shown to have corrupted his adversary's agent in the very transaction as to which specific performance is sought. *Stromberg v. Alexander*, 707.

REMOVAL OF CAUSES.

PROCEEDINGS TO PROCURE.

Motion: Statutory time limit in which to make: When statute not
1 applicable. An application to remove a cause from a state to a Federal court, by reason of the amount involved, etc., must be made at or before the time when the state law or regular rule of court requires an answer. (U. S. Comp. Stat., Sec. 1011, Judicial Code, Sec. 29.) This rule has no application when the pleading which creates a removable suit *requires no answer*. *Markey v. Ry. Co.*, 255.

Negligence in demanding removal: Excusable failure to learn facts.
2 When plaintiff's own pleading, after answer day, creates a suit removable to the Federal court, defendant need only demand the removal with reasonable diligence. Negligence in asking for the removal cannot be predicated on the mere fact that thirteen days elapsed after the filing of such pleading before defendant actually discovered that such pleading had been filed, when (a) he had no reason to surmise that such a pleading would be filed and (b) moved promptly on making such discovery. *Markey v. Ry. Co.*, 255.

Waiver of right to remove: Knowledge of conditions: Necessity for.
3 Waiver of a right presupposes knowledge of the facts giving rise to the right. Applied in instant case, where it was claimed that defendant had waived its right to remove a cause to the Federal court. *Markey v. Ry. Co.*, 255.

REMOVAL OF CAUSES Continued TO**SALES**

Laches: Filing petition after commencement of trial. Attention
4 is called to the fact that the filing of a petition for removal of a cause to Federal court *after the commencement of the trial* does not necessarily establish laches. *Markey v. Ry. Co.*, 255.

REPLEVIN.**RIGHT OF ACTION.**

Nature of action: Off-sets: Issues allowable. Matters which are
1 not pleaded and which cannot properly be pleaded in an action of replevin (Sec. 4164, Code, 1897) cannot be determinative of the right to maintain the action. *Jessen v. Phoenix*, 505.

JUDGMENT, FORM OF.

Form: Replevin. It is immaterial that the final judgment in a
2 replevin action was labeled a "decree," the matters therein contained being such as the law commanded. The law concerns itself with the substance, not the shadow of things. *Jessen v. Phoenix*, 505.

RESCISSION. See **BILLS AND NOTES**, 2; **EXCHANGE OF PROPERTY**, 1; **SALES**, 2.

SALES.**DELIVERY.**

What constitutes: Intention of parties. "Delivery" is an all-im-
1 portant question in those cases wherein the vendee of property of value, in defense of an action for the price, pleads (a) fraud, and (b) rescission, and plaintiff counters with a plea of (a) delivery of the property and (b) retention by vendee. A delivery is any act, in keeping with the intention of the parties, by which the vendor loses and the vendee acquires control of the property. *First Nat'l Bank v. Cook*, 41.

RESCISSION BY BUYER.

Fraud: Return of property: Necessity for. Failure of a vendee
2 to return or to offer to return property received under a contract induced by false and fraudulent representations is fatal

SALES Continued

TO

TAXATION

to a rescission of the contract, unless the vendee shows the property is worthless. *First Nat'l Bank v. Cook*, 41.

SCIENTER. See FRAUD, 1, 4.

SHERIFFS AND CONSTABLES.

COMPENSATION.

Salary: "Receipts of office": Construction of statute. A statute
1 should be construed in the light of subsequent and existing companion statutes on the same subject-matter. Therefore, it is held that the fees to the sheriff for summoning juries, as provided by Sec. 511, Code, 1897, though "to be paid out of the county treasury," constitute "receipts of the office" within the meaning of Sec. 511-a, Sup. Code, 1913, subsequently enacted, which provides for a minimum salary to be paid out of the "receipts of the office." Therefore, such fees should be charged to the sheriff in adjusting his salary. *McCord v. Page County*, 546.

SIGNATURE. See BILLS AND NOTES, 4.

STATUTES. See MASTER AND SERVANT, 2, 3; SHERIFFS AND CONSTABLES, 1.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STREET RAILROADS.

ORDINANCE REGULATING SPEED.

Expiration of franchise: Continued use of streets: Ordinance lim-
1 **iting speed: Validity.** A holding of the court of last resort that, under an ordinance, the *franchise* of a street railway company had expired, does not impliedly repeal a section of the said ordinance limiting the speed of cars when the company availed itself of an order of court granting it permission to occupy the streets for a named period in which to negotiate a new franchise. *Flannery v. Interurban Co.*, 238.

TAXATION. See APPEAL AND ERROR, 1; CONSTITUTIONAL LAW, 3-6; COUNTIES; MUNICIPAL CORPORATIONS, 6.

TENDER

TO

TRIAL

TENDER.**SUFFICIENCY.**

Coupling with condition: Invalidity. A tender, coupled with a
1 condition that it be received "in full settlement," is not a legal tender. *Simons v. Petersberger*, 564.

TRANSACTIONS WITH DECEASED. See **WITNESSES**, 2.

TRANSCRIPT. See **APPEAL AND ERROR**, 6.

TRANSFER OF ACTIONS. See **ACTIONS**.

TRANSIENT MERCHANTS' ACT. See **CONSTITUTIONAL LAW**.

TRESPASS.**PLEADING.**

Basis for recovery: Shifting ground. One cannot recover damages
1 on the theory of a trespass when his claim is distinctly based on another ground, to wit, a breach of warranty. *Day v. Dyer*, 437.

TRIAL. See **ACTIONS**.

RECEPTION OF EVIDENCE.

Exclusion of evidence: Non-necessity to continue offer. When the
1 court has once refused to receive evidence on a certain subject, such ruling is, in effect, a direction to the party offering to refrain from further offer of evidence on the same point. *Geddes v. McElroy*, 633.

ARGUMENT AND CONDUCT OF COUNSEL.

Reading depositions: Discretion of court. Whether depositions
2 may be read by counsel during argument to the jury, even by way of answer to argument of opposing counsel, is discretionary with the court. *Van Vliet, etc., v. Crowell*, 64.

TRIAL Continued**TAKING CASE FROM JURY.**

Directed verdicts: Test to determine: Allowable inferences. When
3 the court is met by motion to direct a verdict, it should carry to the aid of the evidence every inference reasonably permissible in support of the issues. Motion held properly sustained. *Thompson v. Cudahy*, 579.

Directed verdict: When inevitable. When the record shows with-
3a out dispute (a) the price defendant agreed to pay for the property, (b) delivery, (c) an attempted rescission by defendant and an abandonment of the attempt, and (d) the withdrawal by defendant of all his counterclaims, a directed verdict is inevitable. *Pleak v. Marks*, 551.

INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Instructions: Invading province of jury: Negligence. The court
4 must not, in its instructions, even inferentially, invade the province of the jury. So held where the court, by inference at least, told the jury that the actions of an injured person, in view of certain knowledge, and the failure to do certain things, constituted negligence. *Whitman v. Ry. Co.*, 277.

Submitting undisputed questions: Error. Undisputed questions
5 should not be submitted to the jury. Such submission held error. *Thompson v. Thompson*, 583.

INSTRUCTIONS—FORM, REQUISITES AND SUFFICIENCY.

Undue emphasis on evidence: Biased recital of facts. It is re-
6 versible error for the court in its instructions to unduly emphasize the facts and circumstances which tend to disparage plaintiff's theory, while at the same time giving undue prominence to the facts and circumstances which tend to exculpate defendant. The practice of reciting evidentiary facts is condemned, generally. *Whitman v. Ry. Co.*, 277.

Assumption of truth of undisputed fact. A fact, testified to by an
7 interested witness, and not denied, and with no attendant circumstance casting doubt upon the matter of veracity, may be treated in the instructions as true. *Colsch v. Ry. Co.*, 78.

Conflict: Error. Conflicting instructions, one correct, the other
8 incorrect, ordinarily constitute prejudicial error. An instruc-
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tion permitting the jury (1) to find negligence from the mere violation of an ordinance and (2) to negative such negligence by finding a certain fact, of which there was no sufficient evidence, is in prejudicial conflict with other instructions defining negligence generally as the failure to exercise reasonable care, the implication of negligence resulting from the violation of a law not depending on the exercise of care. *Blake v. Ry.*, 600.

Leading jury away from ultimate question. The task set for the
9 jury should be to pass directly and exclusively on the pivotal questions at issue. An instruction which carries the jury away from such pivotal question and assigns to it the task of solving some other question as "the real test," can have no other effect than to lead the minds of the jury away from the pivotal question, with consequent confusion. *Thompson v. Thompson*, 583.

Series of written instruments: Relative importance: Construction.
10 In the consideration of a series of written instruments, all consistent with either one of two conflicting theories or contentions, the court was not justified in instructing the jury that a particular one controlled the others. *Thompson v. Thompson*, 583.

INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Basis, sufficiency of. Where there was evidence tending to show
11 that an injured party had acknowledged having an insecure neckyoke and had used it on the occasion when he was injured, *held*, the record justified an instruction to the jury to determine whether the acknowledgment had reference to the neckyoke used on the occasion when the party was injured or to some other neckyoke. *Miller v. Harrison County*, 270.

Issues: Duty to submit. If there is evidence tending to sustain a
12 material issue, such issue must be submitted to the jury. *First Nat'l Bank v. Cook*, 41.

Unsupported theory: Negligence. It is error to instruct on a theory
13 not supported by the evidence. So held in negligence case. *Blake v. Ry.*, 600.

VERDICT—AFFIDAVITS TO SUSTAIN OR IMPEACH.

Ultimate facts on which based: Affidavits of jurors: Incompe-
14 **tency.** Affidavits of jurors cannot be received to show the ulti-

TRIAL Continued TO VENUE

mate facts upon which a verdict was based. Conflicting instructions having been given on the subject of negligence, the contention of the prevailing party that the affidavit of jurors on file showed that the verdict was based on the contributory negligence of the injured party, and therefore the conflicting instructions were without prejudice, was rejected because of the incompetency of such affidavits. *Blake v. Ry.*, 600.

VERDICT—EXCESSIVENESS.

Damages: Excessive verdict: Personal injury. Verdict of \$20,000, 15 reduced by trial court to \$14,000, *held* not excessive under facts of instant case. *Pelton v. Ry. Co.*, 91.

Death of child: \$3,300. Verdict of \$3,300 for death of an eight- 16 year-old child of ordinary ability sustained. *Crawford v. McElhinney*, 606.

UNDUE INFLUENCE. See **BILLS AND NOTES**, 2, 5–8; **PLEADING**, 2; **WILLS**, 4–8.

VENDOR AND PURCHASER.

ACTION FOR DAMAGES.

Vendee's action for possession: Costs and attorney fees: Vendor's 1 liability. A vendor of land is not liable for court costs and attorney fees expended by the vendee in an unsuccessful action to remove from the premises one who claimed to be the tenant of vendor, the vendor having no notice of such action or opportunity to participate therein. *Richards v. Fredrickson*, 669.

VENUE. See **MORTGAGES**, 2.

OFFICE OR AGENCY.

Pottawattamie county: Avoca and Council Bluffs district: Office 1 or agency. An action may properly be brought in the Avoca district of Pottawattamie county against a resident of Council Bluffs in said county, when the action grew out of or was connected with an agency maintained by defendant at Avoca, irrespective of the question whether such two districts are the equivalent of two counties. (Sec. 3500, Code.) *Pleak v. Marks*, 551.

VERDICTS **WILLS**
TO
VERDICTS. See **MASTER AND SERVANT**, 1a; **NEW TRIAL**, 1;
TRIAL.

WAIVER. See **ACTIONS**, 2; **FRAUD**, 5; **INSURANCE**, 10, 11, 12;
JURY, 1; **PLEADING**, 4; **REMOVAL OF CAUSES**, 3.

WARRANTY. See **EVIDENCE**, 8.

WATERS AND WATERCOURSES.

DIVERSION.

Extent of right. Diversion of waters from their natural flow
1 without *substantial* injury to the lower proprietors is lawful.
Thomas v. City, 571.

WILLS. See **EXECUTORS AND ADMINISTRATORS**, 3.

TESTAMENTARY CAPACITY.

Mental incompetency: Delusions: Will must be offspring of.
1 Merely showing that testator was possessed of a delusion
raises no question for a jury. It must fairly appear that
the will was the offspring of the delusion. Zinkula v. Zin-
kula, 287.

CONTRACT TO DEVISE OR BEQUEATH.

Degree of proof. The proof required to establish an agreement
2 to make a will or to leave property to a certain one must
be clear, satisfactory and convincing. Evidence reviewed and
held to establish the contract alleged. Horner v. Maxwell, 660.

Homestead as affecting validity. An oral agreement of a hus-
3 band and wife to will the property possessed by them at the
time of their death to a certain child, with no restriction on
the right to dispose of any of their property during their
life time, is not invalid because such agreement might include
a homestead. Horner v. Maxwell, 660.

UNDUE INFLUENCE.

Declarations of one employing undue influence: Evidence. Declar-
4 **ations hostile to a disinherited heir, made either before or**

WILLS Continued**TO****WITNESSES**

after the execution of a will, by one charged with having employed undue influence on testator, are admissible to show the state of mind of the declarant. *Zinkula v. Zinkula*, 287.

Testator's state of mind: Declarations. Under a charge that a will was the result of undue influence, the declarations of the testator made to a disinherited heir prior to the making of the will are admissible as bearing on his (testator's) state of mind. *Zinkula v. Zinkula*, 287.

Declarations of testator not substantive evidence. He who would overturn a will on the ground of undue influence must not rest on the declarations of the testator alone. *Zinkula v. Zinkula*, 287.

Opportunity to employ: Effect. Disposition or state of mind to employ undue influence, plus an *opportunity* to employ such influence on testator is not of itself sufficient to prove the ultimate fact of undue influence. *Zinkula v. Zinkula*, 287.

Inequality of distribution: Effect. Inequality of distribution will not, of itself, defeat a will—is not, of itself, any evidence of undue influence. *Zinkula v. Zinkula*, 287.

WITNESSES.**COMPETENCY.**

Attorney as witness: Duty to withdraw from case. The Supreme Court "much prefer that counsel should not testify as a witness unless it is necessary, and that they should then withdraw from the active management of the case." *Stickles v. Townsend*, 697.

Transaction with deceased: Agreement to make will to child: Testimony of mother. The mother of a child is a competent witness to testify to a transaction had by her with deceased persons, in which such deceased persons agreed to adopt and will their property to such child. In such case, the mother is not a person "from, through or under whom" such child derives any title or interest, within the meaning of Sec. 4604, Code, 1897. *Horner v. Maxwell*, 660.

CONFIDENTIAL AND PRIVILEGED COMMUNICATIONS.

Malice: Effect. The element of "malice" will destroy the privileged character which ordinarily attaches to communications

WITNESSES Continued

TO

WORDS AND PHRASES

between attorney and client. So held in an action by plaintiff against an attorney for writing false and defamatory matters to his client of and concerning plaintiff. *Simons v. Petersberger*, 564.

Letters of attorney: Client not party defendant. Letters written
4 by defendant, an attorney, to his client, not a party to the action, alleged to be maliciously false and defamatory of plaintiff's credit and business, are not privileged. They cannot be excluded because the client, not a party to the action, has not given his consent. *Simons v. Petersberger*, 564.

CROSS-EXAMINATION.

Evidence: Overloading stock cars. An expert witness having
5 testified to the number and weight of cattle which could be loaded into a certain car without overcrowding, *held*, he should have been permitted on cross-examination, in view of the record, to testify as to the number of calves of certain weight which he would include in his estimate. *Held*, the exclusion of the answer was nonprejudicial because fully covered by other witnesses. *Colsch v. Ry. Co.*, 78.

WORDS AND PHRASES.

"Fugitive from justice." *Leonard v. Zweifel*, 522.

"Receipts of office." *McCord v. Page County*, 546.

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